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SECRECY AND REAL PROPERTY

Dale A. Whitman*

It is not unusual for owners of real property to wish to conceal from government or the public either the fact of their ownership or certain salient characteristics of the property they hold. The objective of this article is to consider the extent to which this desire for secrecy is supported by sound policy and American legal doctrine. It will focus on the civil recourse available to an owner of real property against private persons who, without the owner's knowledge and consent, reveal information about the ownership or physical characteristics of the property. The article will also consider whether the law does or should affirmatively compel disclosure of such facts by an owner.

I. THE OWNER'S DESIRE FOR SECRECY: MOTIVATIONS AND POLICY CONSIDERATIONS

A. Owner's Motivations

Owners may seek to conceal many of the characteristics of land and its ownership because of the repercussions that could result from their disclosure. Perhaps the fact about realty most frequently sought to be concealed is the identity of the owner himself. Often, identification of the owner would bring some measure of obloquy upon him¹ or would prove embarrassing.² The owner might be a celebrity, politician, or have other "image" problems that would be accentuated by ownership of certain types of real estate. Such persons, as well as the ill or elderly, might well fear importuning from disgruntled tenants or customers at inconvenient times and places.³ The owner of property also may have reason to hide

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1. As an example, consider ownership of slum properties that contain numerous housing code violations.

2. An example of a potentially embarrassing use of property would be the rental of it for use as an "adult" theatre, pornographic bookstore, or similar purposes that are either illegal or offend the mores of the community.

3. Such fears would not be irrational in the light of increasing militancy among residential tenants. See generally Indritz, *The Tenant's Rights Movement*, 1 N.M.L. REV. 1 (1971); Note,

his ownership when adverse public reaction could result in harm to the property rather than to himself. Thus, the property's rental value might be reduced if it were known widely that its owner was involved with organized crime⁴ or was a sheik from one of the OPEC nations.⁵ Conversely, public knowledge that a single developer was assembling numerous land parcels to build a major project might greatly inflate the prices

Tenant Unions: Their Law and Operation in the State and Nation, 23 U. FLA. L. REV. 79, 96-97 (1970). See also *Hibbs v. Neighborhood Organization to Rejuvenate Tenant Housing*, 433 Pa. 578, 252 A.2d 622 (1969), in which the Pennsylvania Supreme Court held the tenants' picketing of a landlord's personal residence was permissible in light of the "secretive manner" in which the landlord did business. The court stated, "[W]hen a landlord conducts his business in a manner to avoid detection and not at a regular place of business, informational picketing may not be enjoined for the sole reason that tenants and others resorted to picketing the landlord's home." 252 A.2d at 624. The *Hibbs* case was discussed in 1971 URB. L. ANN. 223, in which the author praised the decision for recognizing that many "slumlords" absent themselves from a jurisdiction where they rent housing in order to avoid hearing complaints, being served with housing authority orders, and detection generally. Residential picketing provides an effective means of publicizing these practices of slum landlords. *Id.* at 226-27.

Purchasers of tract homes or condominium units have also been increasingly inclined in recent years to picket the developer's unsold units or projects as a means of creating pressure for correction of construction defects. At least two courts have refused to enjoin such activity. *Pebble Brook, Inc. v. Smith*, 140 N.J. Super. 273, 356 A.2d 48 (1976); *Plainview Realty, Inc. v. Board of Managers* 86 Misc. 2d 515, 383 N.Y.S.2d 194 (Sup. Ct. 1976); cf. *West Willow Realty Corp. v. Taylor*, 23 Misc. 2d 867, 198 N.Y.S.2d 196 (Sup. Ct. 1960) (granting an injunction on the ground that there was insufficient evidence of an identity between the picketed developer and the demonstrator's vendor). The favorable attitude toward "consumer picketing" in these cases is traceable, at least in part, to the first amendment protection extended by the U.S. Supreme Court to persons who distributed leaflets at a real estate broker's church, at a shopping center in the suburb where he lived, and at the doors of his neighbors, charging him with racial discrimination and "block-busting." *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). The Court in *Keefe* observed that "respondent [was] not attempting to stop the flow of information into his own household, but to the public," *id.* at 421, and stated that the flow of information to the public was deserving of constitutional protection "even where [the] expressions were intended to exercise a coercive impact on respondent." *Id.* at 420. See Annot., 62 A.L.R.3d 227 (1975).

More recently the attention of tenant groups seems to have focused on legislation, see Note, *Uniform Residential Landlord and Tenant Act: New Hope for the Beleaguered Tenant?*, 48 ST. JOHNS L. REV. 546 (1974); and litigation, see Note, *New Judicial Approaches to Maintaining Housing Quality in the Cities*, 4 FORDHAM URB. L.J. 403 (1976), but the possibility of direct tenant action remains.

4. The impact on property values of such knowledge is hard to estimate. It seems to have had little effect, for example, in Las Vegas. See e.g., Veho, *The Underworld's Back Door to Las Vegas*, Reader's Digest, Nov. 1974, at 207.

5. Foreign (especially Arab) ownership of United States real estate has become a matter of increasing national concern. See Foreign Investment Study Act of 1974, Pub. L. No. 93-479, 88 Stat. 1450 (1974), discussed in Note, *Foreign Direct Investment in United States Real Estate: Xenophobic or Principled Reaction?*, 28 U. FLA. L. REV. 491 (1976). The report to Congress required by the Act is U.S. DEP'T OF COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES (1976). See 8 *id.*, apps. L-M, which deal with real estate. See also International Investment Survey Act of 1976, 22 U.S.C. §§ 3101-3108 (1976); U.S. DEP'T OF AGRICULTURE, FOREIGN INVESTMENT IN U.S. REAL ESTATE (1976).

that the remaining owners would demand after the buyer's identity became known.⁶

Under the recording acts of American jurisdictions, it is essential that some recorded document disclose the identity of a record owner for each privately owned parcel of land. Otherwise, the owner is subject to a serious risk that the previous owner will make adverse conveyances or mortgages to bona fide purchasers, thus jeopardizing the current owner's title.⁷ This is not to say that the records must disclose the owner's "real" identity; on the contrary, the record owner may be a corporation, trust, or other artificial entity subject to the full control of the beneficial owner, but with no document on the public record indicating the relationship. This technique has been developed most completely in Cook County, Illinois, where the "land trust" is widely used to hold real estate for undisclosed beneficial owners.⁸ The potential for abuse is great. One writer has observed that "in the case of land trusts it appears that the secrecy aspects have heavily *encouraged* impropriety."⁹

It does not follow that every use of an artificial entity as an ownership tool has a clandestine motivation. The intermediate entity often is used merely for convenience in conveyancing,¹⁰ to avoid usury statutes¹¹ or

6. A classic illustration is the assembly of land for the new town of Columbia, Maryland, by James Rouse during the early 1960's. Rouse employed a variety of undisclosed agents to purchase the land, but even so, the prices paid for the last parcels acquired were far above those of the early parcels. Aggregate land costs would clearly have been much higher in the absence of secrecy. See G. BRECKENFELD, *COLUMBIA AND THE NEW CITIES* (1971).

7. See 4 AMERICAN LAW OF PROPERTY § 17.3 (A.J. Casner ed. 1952); L. SIMES, *A HANDBOOK FOR MORE EFFICIENT CONVEYANCING* 18 (1963).

8. The land trust is a common law device that allows an owner of land to transfer it to a trustee, who then becomes the holder of both the legal and equitable titles for the benefit of the named beneficiary. It has been estimated that nearly 80% of the land parcels in Cook County, Illinois have been or are currently held under land trusts. See Note, *Land Trust Secrecy—Perhaps a Secret No More*, 23 DEPAUL L. REV. 509, 510-11 (1973); Feature, *The Illinois Land Trust—Shroud with a Silver Lining?*, 5 LOY. CHI. L.J. 412, 413 n.11 (1974).

The device has not yet been employed on a large scale throughout the nation, but at least four other states have enacted statutes that appear to be aimed at approving the Illinois Land Trust concept, and its use has been recommended by commentators in several additional states. See Birnbaum & Monahan, *The Nominee Trust in Massachusetts Real Estate Practice*, 60 MASS. L.Q. 364 (1976); DeWitt, *The Illinois Land Trust—Its Undeveloped Potential in California*, 41 L.A.B. BULL. 20 (1965); Comment, *A Device for Texas Land Development: The Illinois Land Trust*, 10 HOUS. L. REV. 692 (1973).

9. Note, *Land Trust Secrecy—Perhaps a Secret No More*, 23 DEPAUL L. REV. 509 (1973). One major problem in Illinois has been that slumlords have succeeded in concealing their identities and thus have escaped notoriety for their various abuses of minorities who must live in their buildings. Statutes passed to compel disclosure of the beneficiaries in the event of building code violations have proved ineffective in solving the problem. *Id.* at 510-11.

10. Conveyancing is easier when the property is held in trust. The signatures of multiple owners need not be obtained; the death or incompetence of an individual owner does not cloud the title; and

judgment liens,¹² to exclude personal liability on a mortgage loan, or to accomplish some tax objective.¹³ Nevertheless, the device may also be used for less legitimate reasons, and at least some of these—avoidance of fines and penalties, for example—may depend on secrecy.¹⁴ In such cases the owner's objective may be to conceal his identity from both the general public and the specific governmental officials who have responsibility for enforcing the law he seeks to avoid. To the extent that secrecy is a factor, these arrangements are our present concern.

In many cases the owner of land desires secrecy, not about his own identity but about the characteristics of the land or the improvements on it. Most often this desire is closely tied to the owner's plans to market the property and is directly affected by the importance, which is usually negative, that he anticipates the market will attach to the facts in question if they become known. Obviously, the seller or landlord of a house with a defective furnace, roof, or other physical problems or code violations may prefer not to disclose such conditions to prospective buyers or tenants, or even to a real estate broker with whom he lists the property. Similarly, land located in a mineral-rich area may contain no valuable mineral deposits, but only an unusually candid vendor would be likely to advertise the fact. Both developing rules of implied warranty¹⁵ and the

partition is not available. See Feature, *The Illinois Land Trust—A Shroud with a Silver Lining?*, 5 LOY. CHI. L.J. 412, 415-19 (1974).

11. Corporate borrowers are exempt from usury protection in some states even if the corporation was formed exclusively for the purpose of usury statute evasion. See Hershman, *Usury and the Tight Mortgage Market Revisited*, 24 BUS. LAW. 1121, 1132-34 (1969).

12. A judgment is a lien on the defendant's real property, but it does not extend to his interests in land trusts under Illinois law. See Turner, *Some Legal Aspects of Beneficial Interests Under Illinois Land Trusts*, 29 ILL. L. REV. 216, 219 (1945).

13. In general, courts have been willing to "look through" shell corporations and other entities and attribute ownership to their shareholders or beneficiaries. Often this is precisely the result desired by the taxpayer, particularly when the property is generating substantial income tax deductions. See Riess, *Planning for the Use of Nominee Corporations in Real Estate Transactions*, 25 TUL. TAX INST. 11 (1975); Wright, *Owning Real Estate Through Shams and Nominees*, 6 REAL EST. REV. 53 (1976).

14. Owners of rental housing containing substantial code violations sometimes use sham intermediary owners to avoid code enforcement proceedings and resultant fines. See Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1277-78 n.108 (1966); Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 813-14 (1965). Cf. Garrett, *Legal Aspects of Land Trusts*, 35 CHI. B. REC. 445, 453-54 (1954).

15. Increasingly, courts are holding builders of new housing liable for defective design or construction. See Note, *Lender-Vendor's Liability for Structural Defects in New Housing*, 53 DEN. L.J. 413 (1976); Note, *Extension of Implied Warranties to Developer-Vendors of Completed New Homes*, 11 URB. L. ANN. 257 (1976). These holdings have rarely been applied to "existing" housing or to nonresidential properties, although the Uniform Land Transactions Act would do so to some extent. See UNIFORM LAND TRANSACTIONS ACT § 2-309.

tort law of fraud and fraudulent concealment¹⁶ deal with these problems to some extent, but their coverage is spotty and limited; in many situations the vendor is reasonably safe from liability if he merely says nothing.¹⁷

B. Public Policy Considerations That Militate Against Secrecy

Although the desires of landowners for secrecy are often understandable, they must be evaluated in the light of the countervailing interests of government and the public in disclosure. On balance, these interests militate against total secrecy.

1. The need for aggregated data

The collection, assembly, and dissemination of data about the functioning of societal institutions is an important role of government in a complex, technologically oriented nation such as ours. Such data are essential to governmental decisionmakers and to voters as they resolve public issues. In many cases the data involved are closely associated with the ownership, use, or physical characteristics of real property. Although individual parcels usually would not be listed in the published version of these data, the concealment efforts of private owners could well obstruct their collection, resulting in inaccuracies and erroneous decisions.

Several types of data that are subject to this problem can be delineated. The growing wealth of oil-producing nations has caused increasing concern in the United States regarding ownership of American land by aliens.¹⁸ To the extent that the nationality of landowners is disguised or

16. See 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 7.14 (1956); W. PROSSER, *LAW OF TORTS* § 106 (4th ed. 1971).

17. The classic view is that mere silence is not actionable, but exceptions are often made if a confidential or fiduciary relationship exists between the parties, if the vendor makes a partial statement that tends to mislead, or if the transferor has special knowledge or means of knowledge not available to the transferee. See W. PROSSER, *supra* note 16, § 106. These categories of exceptions are amorphous and their application is uncertain. See, e.g., *Neff v. Bud Lewis Co.*, 89 N.M. 145, 548 P.2d 107 (1976), in which the court held a real estate broker liable for his failure to disclose to buyers of a building defects in the heating and air conditioning system of which he was aware. Cf. *Archuleta v. Kopp*, 90 N.M. 273, 562 P.2d 834 (1977), in which a blind purchaser of a home was allowed to recover for smoke damages caused by his lighting a fire in a nonfunctioning fireplace, on a theory of innocent misrepresentation or constructive fraud. *Id.* at 277, 562 P.2d at 838.

18. See 1 U.S. DEP'T OF COMMERCE, *FOREIGN DIRECT INVESTMENT IN THE UNITED STATES* 183 (1976); Note, *Foreign Direct Investment in United States Real Estate: Xenophobic or Principled Decision*, 28 U. FLA. L. REV. 491, 493 (1976).

During 1972, the largest foreign direct investors in the United States were the Japanese, who with an investment of \$105 million, increased their annual rate of investment five fold over that of 1971.

concealed, it is impossible for policymakers to make intelligent judgments about whether alien ownership is a problem or to know what types and locations of land are involved.

The distribution of wealth among American citizens is also a legitimate matter of public concern.¹⁹ Land is obviously an important element of national wealth; but, if ownership is secret, it may be impossible to relate it to other forms of wealth and to draw conclusions about the aggregate distribution. Knowledge about the relationship of land ownership to other demographic characteristics, such as race or sex, may be helpful to public decisionmaking as well as for the administration of public laws designed to protect minorities.²⁰ Again, secrecy can frustrate efforts to collect such data.

Information about the physical features of land can also be essential to policymaking. Thus, the extent of dilapidation, structural unsoundness, or lack of necessary plumbing facilities in housing must be known in order for governmental officials to attack housing problems sensibly.²¹ For example, a program of housing subsidies premised upon the presence of a large supply of existing rental housing at quality levels not too far below code standards could be disastrous if subsidies were injected into a market that lacked such housing.²² Hence, effective concealment by landlords of the true condition of their properties could lead to serious policy errors.

The current concern about America's indigenous energy sources provides another example. If landowners conceal or falsify known informa-

The book value of foreign direct investment in the U.S. reached \$17.7 billion at the end of 1973, an increase of 24% over the previous year. This can be compared with a total of only \$3.4 billion at the end of 1950. *Id.* at 496. See generally note 5 *supra*.

19. Although data on household income in the United States is abundant, data on wealth or net worth is surprisingly sparse. See U.S. BUREAU OF THE CENSUS, *SURVEY OF ECONOMIC OPPORTUNITY* (1967).

20. For example, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3631 (1970), prohibits discrimination based on race, religion, national origin or sex in the sale or rental of housing. 42 U.S.C. § 3608(d), which provides for the administration of the Act, states, "The Secretary of Housing and Urban Development shall (1) make studies with respect to the nature and extent of discriminatory housing practices" Practices which obscure the identity of land owners may make assessment of the effectiveness of Title VIII more difficult. *

21. The absence of satisfactory data concerning housing quality is discussed in U.S. NATIONAL COMM'N ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 67-69 (1969), and in HARVARD-M.I.T. JOINT CENTER FOR URBAN STUDIES, *AMERICA'S HOUSING NEEDS: 1970-1980*, 4-1 to 4-4 (1973). More comprehensive data about housing quality is now becoming available as a result of the annual housing surveys commenced jointly in 1973 by the Census Bureau and HUD. See U.S. DEP'T OF COMMERCE—U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, *ANNUAL HOUSING SURVEY: 1973, INDICATORS OF HOUSING AND NEIGHBORHOOD QUALITY* (1975).

22. See Whitman, *Federal Housing Assistance for the Poor: Old Problems and New Directions*, 9 URB. LAW 1, 35-36 (1977).

tion about oil, gas, coal, or other deposits on their land—whether by exaggerating or minimizing the size, location, and ease of extraction of the resources—the public bodies charged with ensuring an adequate fuel supply could be hampered in their data collection efforts.²³

2. Law enforcement

In many contexts an owner of land may become personally liable for fines, taxes, assessments, or even imprisonment as a result of his failure to carry out duties imposed by law. Concealed ownership handled through a land trust or other shell may well assist such evasions and make law enforcement difficult and uneven.²⁴ Consider, for example, Chicago Alderman Thomas Keane, who owned an interest, through a land trust, in a corporation that obtained a lucrative parking lot contract with city-owned O'Hare International Airport. The alderman did not reveal his interest when he voted to grant the contract.²⁵ Statutes in many jurisdictions would prohibit such actions,²⁶ but the land trust makes it much less probable that they will come to light.

Another illustration involved a court-appointed receiver of certain violation-ridden slum apartment buildings in Chicago. His duty was to manage the buildings and effect the necessary repairs. Instead, through various nominees and land trusts, the receiver acquired the mortgagees' interest in the mortgages on the buildings, caused them to be foreclosed, and bought the properties at the subsequent foreclosure sales, all in flagrant violation of his fiduciary duties.²⁷ Both this case and Keane's deal-

23. See, e.g., Speech of President Carter (Apr. 20, 1977), reprinted in 35 CONG. Q. 751 (Apr. 23, 1977); Smith, *Estimating Natural Gas Reserves Thorny Problem for U.S.*, Wash. Post, Mar. 18, 1977, § A, at 9, col. 1; FEA Lists Higher U.S. Reserves Figures, OIL & GAS J., July 7, 1975, at 32.

24. Housing code violations are a typical illustration; see note 14 *supra*. Evasion of contractual obligations may also be facilitated by secrecy, as when a mortgagee transfers his land by assigning his beneficial interest in a land trust to avoid triggering the accelerated payment clause of the mortgage. See Flaherty, *Illinois Land Trusts and the Due-on-Sale Clause*, 65 ILL. B.J. 376 (1977).

25. The alderman's relationships were revealed in a series of newspaper articles. Chicago Sun-Times, Dec. 10-17, 1973. See also Note, *Land Trust Secrecy—Perhaps a Secret No More*, 23 DEPAUL L. REV. 509, 511 n.10 (1973). Mr. Keane was subsequently convicted of mail fraud in connection with another scheme employing land trusts. United States v. Keane, 522 F.2d 534 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976).

26. See, e.g., ILL. REV. STAT. ch. 24, § 3-14-4 (1962), which provides that "[n]o municipal officer shall be interested, directly or indirectly, in the purchase of any property which (1) belongs to the municipality, or (2) is sold for taxes or assessments, or (3) is sold by virtue of legal process at the suit of the municipality." (Emphasis added). See also Note, *Fighting Conflicts of Interest in Officialdom: Constitutional and Practical Guidelines for State Financial Disclosure Laws*, 73 MICH. L. REV. 758 n.4 (1975).

27. City of Chicago v. Hart Bldg. Corp., 116 Ill. App. 2d 39, 253 N.E.2d 496 (1969).

ings were exposed, but it is easy to imagine other cases on similar facts in which the culprit is never caught. Although secret ownership devices are not the root of all evil, they certainly can assist in its perpetration.

3. *An informed public*

Our discussion thus far has focused on the need for governmental officials to know the facts about land. In a broader sense, the citizenry also has a need to know—a need not confined to governmental statistics but encompassing virtually the whole range of human behavior on land as it affects neighboring persons. This argument must not be pressed too far, for there is plainly an appropriate zone of privacy that protects many land-oriented activities. But with land, perhaps more than with any other species of property, one's own use affects one's neighbors, generating both positive and negative externalities.²⁸ This is so primarily because land is immobile; hence its use produces "neighborhood effects" that are pervasive and long-lasting. Such a simple matter as painting one's house or landscaping one's yard can have a great effect, good or bad, on surrounding landowners. Establishing a cattle-feeding operation, a paper mill, or a house of prostitution may impact on the neighborhood in an even more obvious manner.

It is not our present purpose to discuss the mechanisms through which such conflicts can be resolved, but merely to observe that public debate and press coverage is desirable and helpful, and perhaps even constitutionally protected. The identity of the owner of the land in question may be quite relevant to that debate; the "marketplace of ideas" envisioned by the draftsmen of the first amendment²⁹ is arguably incomplete if the owner's name is insulated from the political battle. Public reaction may be altered (and legitimately so) if, for example, it is learned that every "adult" movie theatre in town is owned by the mayor.

4. *Fairness in private transactions*

In general, the vendor of real estate has a significant advantage over the purchaser. He knows the property, usually having possessed and occupied it for some time. The purchaser is a stranger to the land and often

28. See *Fountainbleu Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. 1959) (litigation involving a building that cast a shadow on the cabana, swimming pool, and sunbathing areas of a neighboring hotel); Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); W. SMITH, *HOUSING: THE SOCIAL AND ECONOMIC ELEMENTS* 21-23 (1970).

29. *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940); *Abrams v. United States*, 250 U.S. 616, 630 (1919). See text accompanying note 84 *infra*.

has only a limited time and meager resources for acquainting himself with it. Although equality of information about the good to be transferred is one of the essential ingredients of the classical definition of a competitive market,³⁰ in reality the vendor usually has the edge. For centuries the law steadfastly ignored this disparity, myopically enjoining buyers to beware, whether they had the practical means to do so or not. Only in the last decade has the weight of American law begun to move toward protection of purchasers of defective realty, and even today that protection is often extended only to the most naive purchasers of the most clearly defective property.³¹

Secrecy figures into this equation in two ways: with regard to the purchaser's opportunity to investigate the quality of the property, and with regard to his recourse against the vendor after the sale is complete. The buyer's investigation may be materially aided by information disseminated by government, the press, or merely word of mouth in the community, but this process will be hindered and made ineffectual to the extent that land owners are able to keep information about their property confidential. It can hardly be gainsaid that prospective buyers of "recreational" land in Florida, land that is in fact under water or inaccessible, have benefitted by the efforts of the HUD Office of Interstate Land Sales,³² the Housing and Urban Development Act of 1968,³³ and the press³⁴ to warn them of the risks. Abuses remain, and the efforts of the government and the media cannot eliminate all of them. It is clear, nevertheless, that purchasers are now better informed and more wary than heretofore.

If the vendor defrauds the purchaser or violates an implied warranty, or the Interstate Land Sales Act³⁵ or its state law analogue, civil liability may result. Nevertheless, practical recourse against the vendor depends on identifying him, locating him, and serving him with process. If sham trusts, corporations, or nominees have been employed to effect the sale, these steps are difficult and the purchaser's chances of recovery become more remote. There are, of course, other potential barriers to recovery,

30. See M. SPENCER, *CONTEMPORARY ECONOMICS* 379-397 (1971); note 82 *infra*.

31. See note 15 *supra*.

32. The Office of Interstate Land Sales was created pursuant to Title XIV, Housing and Urban Development Act of 1968, 15 U.S.C. §§ 1701-1720 (1976).

33. *Id.* The Act also provides for the registration of subdivisions, filing of a statement of record, and civil liabilities for a false statement or an omission of a material fact in the statement of record.

34. See, e.g., M. PAULSON, *THE GREAT LAND HUSTLE* (1972); D. TYMON, *AMERICA IS FOR SALE* (1973).

35. See notes 32-34 *supra*. See generally Note, *Regulation of Interstate Land Sales*, 25 *STAN. L. REV.* 605 (1973).

not the least of which may be the vendor's insolvency. Nonetheless, concealed ownership is likely to aid the vendor in escaping liability for the injustice he has caused.

Admittedly, the private market in real estate in many ways departs from the classic competitive market, and no amount of disclosure of information will make the two coincide completely. It is also true that disclosure is not cost free and that the expense of developing and publishing the information in question—especially if it is elaborate and must conform to some government-prescribed format—will ultimately be shared in some fashion among the parties to each individual transaction.³⁶ The lack of information, however, is also costly. When transactions are based on fallacious assumptions, the market is less than fully competitive, and misallocation of resources occurs; in the long run, the productivity of the nation's economy is harmed. The economic damage that flows from secrecy is thus both individual and collective. Although it is hard to quantify this damage, it is difficult to resist the conclusion that, at least with respect to "recreational" land, it has been substantial. This conclusion does not argue irresistably in favor of imposing the burden and cost of disclosure on the vendor, but it strongly suggests that steps in that direction may be desirable.

II. SANCTIONS FOR DISCLOSURE OF INFORMATION CONCERNING REAL PROPERTY

When an owner of real estate desires to keep certain information concerning the property secret, he may be understandably displeased if an individual undermines his efforts by disclosing or publishing the facts in question. This section will consider whether such an irate owner has a private right of action against the discloser. The discussion will focus on state tort law remedies. If, however, the disclosure is made by a state or the federal government, the landowner may also derive protection from specific statutes as well as from the United States Constitution.

A. *The Tort of Privacy Invasion*

Perhaps the most obvious tort law theory that might be applied to the disclosure of facts about real estate is the "right of privacy."³⁷ Unfor-

36. One early estimate placed the cost of registering the typical subdivision under the Interstate Land Sales Act at \$10,000. See *Registration Rules Worry Homebuilders*, 182 ENGINEERING NEWS REC. 24 (Apr. 17, 1969).

37. The "right of privacy" was first suggested in the famous article by Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). See also Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966).

unately, this phrase has been used as a rubric in American courts to cover at least four disparate types of legal wrongs. Professor Prosser's formulation³⁸ has been widely adopted by the courts, and will be followed here. In brief, the wrongs he identifies are: (1) *appropriation* for the defendant's benefit of the plaintiff's name or likeness, usually for advertising or other commercial purposes;³⁹ (2) *intrusion* upon the plaintiff's physical solitude or seclusion, as by physical entry, eavesdropping, or photography in some nonpublic place;⁴⁰ (3) *public disclosure of private facts* under circumstances which would be offensive to a reasonable person;⁴¹ and (4) publicity which holds the plaintiff out to the public in a *false light*, creating an erroneous impression about his character, behavior, or opinions.⁴² There is obviously a substantial overlap between the "false light" cases and actions for defamation,⁴³ but false light privacy suits may well be based on laudatory rather than derogatory communications.⁴⁴ Of the four types of privacy actions mentioned above, however, the "false light" theory appears to have the least probable application to the concerns of this article, since it invariably involves the conveying of an impression which is nonfactual. Our concern here is with facts, and the false light theory will not be discussed in further detail. Each of the other three types of privacy actions, however, may conceivably have application to the disclosure of a landowner's secrets about his land.

1. Appropriation

The term "privacy" is frequently a complete misnomer in appropriation cases. Often the plaintiff is a celebrity or well-known personality

38. W. PROSSER, *supra* note 16, § 117. See also Davis, *What Do We Mean by "Right to Privacy"?*, 4 S.D.L. REV. 1 (1959).

39. The leading case is *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S.E. 68 (1905), in which the plaintiff's name, picture, and false testimonial were used without authority in the defendant's advertising. An interesting recent case is *Rosemont Enterprises, Inc. v. Urban Systems, Inc.*, 72 Misc. 2d 788, 340 N.Y.S.2d 144 (Sup. Ct. 1973), in which the plaintiff, Howard Hughes' assignee, recovered from the defendant manufacturer of "The Howard Hughes Game."

40. A typical example is *Dieteman v. Time, Inc.*, 284 F. Supp. 925 (C.D. Cal. 1968), in which a reporter and photographer gained entry into plaintiff's house on a pretext and surreptitiously recorded and photographed him.

41. See, e.g., *Briscoe v. Reader's Digest Ass'n, Inc.*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971), in which the defendant magazine disclosed plaintiff's past criminal activity eleven years after the fact, during which time he had "gone straight."

42. See generally Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962).

43. *Kapellas v. Kofman*, 1 Cal. 3d 20, 35 n.16, 459 P.2d 912, 921 n.16, 81 Cal. Rptr. 360, 369 n.16 (1969).

44. See Zolich, *Laudatory Invasion of Privacy*, 16 CLEV.-MAR. L. REV. 532 (1967).

who has not the slightest desire to avoid the limelight.⁴⁵ Rather, the burden of the complaint is economic: the plaintiff could have sold his endorsement, picture, or statement to the defendant for commercial use if the defendant had not "stolen" it. Thus the suit's function is to recover for the plaintiff the fee that an endorsement or modeling contract would have produced.

The relevance of the appropriation doctrine to real property is scarcely obvious. For example, it is usually held that only natural persons can recover for appropriation of their names or likenesses.⁴⁶ Thus, one whose horse,⁴⁷ dog,⁴⁸ house,⁴⁹ or car is photographed and used for commercial advertising purposes generally has no ground for recovery. A comparison of two racing car cases is instructive. In both *Branson v. Fawcett Publications*⁵⁰ and *Motschenbacher v. R.J. Reynolds Tobacco Co.*,⁵¹ photographs of the plaintiffs' racers were taken without their consent and were used in advertisements. In neither case was the driver's face identifiable. Yet the plaintiff failed in *Branson* and recovered in *Motschenbacher*. Motschenbacher's car was painted with a distinctive design and colors which had come to be identified with him. He was an experienced professional driver who had given product endorsements in the past; Branson, by contrast, was a part-time driver whose car's markings were not particularly distinctive. Thus, Motschenbacher's personal identity was conveyed by the image of his car in the advertisement, and in that sense his identity had been appropriated.

45. See, e.g., *Uhlaender v. Hendrickson*, 316 F. Supp. 1277 (D. Minn. 1970) (use of baseball players' names in a commercially marketed game); *Palmer v. Schonhorn Enterprises, Inc.*, 96 N.J. Super. 72, 232 A.2d 458 (1967) (names of professional golfers Arnold Palmer, Gary Player, Doug Sanders, and Jack Nicklaus used in defendant's "Pro-Am Golf Game"); *Kimborough v. Coca-ColaUSA*, 521 S.W.2d 719 (Tex. Ct. App. 1975) (picture of college athlete in advertisement). See generally Treece, *Commercial Exploitation of Names, Likenesses and Personal Histories*, 51 TEX. L. REV. 637 (1973); Annot., 23 A.L.R.3d 865 (1969).

In *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), the Supreme Court held that the first amendment did not immunize a television station from "appropriation" liability for broadcasting the performance of a "human cannonball" without his consent.

46. See *Shubert v. Columbia Pictures Corp.*, 189 Misc. 734, 72 N.Y.S.2d 851, *aff'd*, 274 App. Div. 751, 80 N.Y.S.2d 724 (1947).

47. *Bayer v. Ralston Purina Co.*, 484 S.W.2d 473 (Mo. 1972).

48. *Lawrence v. Ylla*, 184 Misc. 807, 55 N.Y.S.2d 343 (Sup. Ct. 1945) (allowing recovery on the ground that an implied term of plaintiff's contract with photographer-defendant prohibited his use of the photographs for other commercial purposes).

49. *Rawls v. Conde Nast Publ., Inc.*, 446 F.2d 313 (5th Cir. 1971); *Rozhon v. Triangle Publ.*, 230 F.2d 359 (7th Cir. 1956). Both of these opinions suggest that the publication would be actionable if enough of the house had been shown to make it readily identifiable to the public as the plaintiff's property.

50. 124 F. Supp. 429 (E.D. Ill. 1954).

51. 498 F.2d 821 (9th Cir. 1974).

One can envision similar situations in real estate. The owner of a famous resort or a house designed by Frank Lloyd Wright may well have come to be so identified with the property in the public mind that the publication of the real estate's photograph or name may be the equivalent of appropriation of its owner's identity. Perhaps even less well-known real estate may trigger the tort.⁵² In such cases, however, it is clear that no secrecy is involved. Indeed, it is the pre-existing notoriety of the plaintiff's ownership of the land that makes the appropriation actionable. Hence, such appropriation cases are really outside the scope of the present inquiry.

2. *Intrusion*

Intrusion is that branch of the right of privacy that focuses on the way information is obtained, rather than on the contents disclosed. It is predicated on the view that some types of data-gathering activities are simply too obnoxious, embarrassing, or offensive to be permitted with impunity.⁵³ Various forms of electronic and photographic surveillance are obvious candidates for this treatment, particularly when carried out against or within the plaintiff's residence.⁵⁴ Often the defendant's activities are equally actionable as common law trespass,⁵⁵ so that the principal func-

52. See note 49 *supra*.

53. See note 40 *supra*. See generally W. PROSSER, *supra* note 16, § 117, at 807-09; Annot., 56 A.L.R.3d 434 (1974).

54. See, e.g., *Fowler v. Southern Bell Tel. & Tel. Co.*, 343 F.2d 150 (5th Cir. 1965) (liability can exist for "tapping" a telephone even when the information obtained is not disclosed to others); *Hamberger v. Eastman*, 106 N.H. 107, 206 A.2d 239 (1965) (landlord who illegally installed a listening device in his tenants' bedroom was liable to them even though there was no evidence that anyone listened or that the information gained by the surveillance was published or communicated to third persons). Surveillance activities, if carried on by government officers, may also violate the unreasonable search provision of the fourth amendment. See, e.g., *United States v. United States Dist. Court (Keith)*, 407 U.S. 297 (1972), which holds that warrantless electronic surveillance of allegedly subversive domestic organizations is unconstitutional.

If the intrusion occurs in a public place in which the plaintiff has no legal "right to be alone," his right of privacy is diminished accordingly. Thus, there is no intrusion if while plaintiff is in public, he is followed and watched, *Forster v. Manchester*, 410 Pa. 192, 189 A.2d 147 (1963), or if his picture is taken, *Gill v. Hearst Publ. Co.* 40 Cal. 2d 224, 253 P.2d 441 (1953) (plaintiffs in "affectionate pose" in public market place); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948) (plaintiff photographed in courtroom). Nevertheless, even in a public place, a cause of action may arise if the intrusion is unreasonable. See, e.g., *Pinkerton Nat'l Detective Agency v. Stevens*, 108 Ga. App. 159, 132 S.E.2d 119 (1963) (blatant shadowing by private investigator that frightened plaintiff and caused public attention to be drawn to her, gave rise to a cause of action).

55. See, e.g., *Rawls v. Conde Nast Publ., Inc.*, 446 F.2d 313 (5th Cir. 1971), in which the defendant's entry into plaintiff's house to take fashion photographs clearly constituted a trespass, but one that the jury apparently thought had been waived by the plaintiff's failure to make sufficiently strenuous and continuing objections to the intrusion.

tion being served by assertion of the right of privacy is an expansion of the measure of damages. Similarly, the invasion may result in the intentional infliction of mental distress, a tort that substantially overlaps the "intrusion" branch of the right of privacy.⁵⁶

To constitute the tort, the intrusion must meet a two-pronged test: it must be an activity that would be objectionable to a reasonable man, and "the thing into which there is intrusion or prying must be, and be entitled to be, private."⁵⁷ Since it is technique and not content that is in issue, it is both plausible and reasonable for a court to impose liability on a defendant who sought information about the quality or ownership of real property by using a patently offensive method or device. Publication or other use of the information would appear to be irrelevant to liability in such a case,⁵⁸ although publication may add other grounds for liability.⁵⁹

3. *Public disclosure of private facts*

The aspect of the right of privacy that sanctions public disclosure of private facts is not likely to be applied to disclosures concerning ownership of real property or its physical characteristics because such facts are generally not "private" in the sense the term is used here. Public disclosure cases, like those involving intrusion, are intended to protect the plaintiff's dignity from embarrassment or affront.⁶⁰ Information about land is only rarely so personal that it would raise such issues. Conceivably, liability could result from a disclosure that the plaintiff owned land on which some illegal, noxious, or socially disapproved activity was taking place. Information about land use alone would not be enough; to be

56. Most plaintiffs do, in fact, allege this element in their complaint for invasion of privacy. *See, e.g.,* *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948); *Pinkerton Nat'l Detective Agency v. Stevens*, 108 Ga. App. 159, 132 S.E.2d 119 (1963). Harassing activities of bill collectors frequently satisfy the elements of both torts. *See, e.g.,* *Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753 (1970).

57. W. PROSSER, *supra* note 16, § 117, at 808.

58. *See generally* cases cited at note 54 *supra*.

59. For example, if defendant publicly disclosed that the results of geophysical testing revealed the absence of mineral deposits on plaintiff-landowner's property, the potential marketability of the real estate could be diminished. Although prospective buyers may have insisted on identical geophysical tests prior to purchasing the property, the plaintiff's potential bargaining and contractual power has been undercut, and he may therefore have a cause of action against the defendant. *See generally* discussion of geophysical testing and business torts, notes 99-114 & accompanying text *infra*.

60. *See* W. PROSSER, *supra* note 16, § 117, at 809-12. Typically, the facts in question must be intimate or embarrassing in nature, such as those involving sexual behavior or prior criminal activity. *See, e.g.,* *Sidis v. F-R Publ. Corp.*, 113 F.2d 806, 809 (2d Cir. 1940), *cert. denied*, 311 U.S. 711 (1940) (information concerning former child prodigy is not so personal that its publication is contrary to community notions of decency).

actionable, the publication would have to link the plaintiff's name or identity with the property.

4. *Privilege to invade privacy of public figures or in the public interest*

For many years state courts have held that one who places another before the public in a false light or who makes a public disclosure of private facts about that person is privileged to do so if the event or fact is newsworthy or if the other person is a public figure.⁶¹ This common law privilege, which has not been applied to intrusion or appropriation cases,⁶² was generally thought to have a basis in the first amendment,⁶³ but the Supreme Court did not so hold until 1967 in *Time, Inc. v. Hill*.⁶⁴ In *Hill*, the plaintiffs had been held hostage in their own home by three gunmen for nineteen hours. Fictionalized accounts of the episode were published as a novel and a stage play, neither of which identified the Hills. Life magazine, however, published an article that named them and portrayed the play as founded on their experience. The Hills' suit, based on the "false light" branch of the right of privacy,⁶⁵ resulted in a judgment against the publisher in the New York courts.⁶⁶ The Supreme Court reversed on the basis of *New York Times Co. v. Sullivan*,⁶⁷ which had created a first amendment privilege for libel of a public official in the absence of actual malice.

In several aspects, *Hill* was a rather startling extension of *Sullivan*, which had involved an advertisement criticizing (partially by false allegations) the handling of racial demonstrations by the Montgomery, Alabama, police. The plaintiff in *Sullivan* was an elected official embroiled in a public controversy, while the Hills were private citizens

61. See W. PROSSER, *supra* note 16, § 118, at 823-26. The two privileges mentioned are arguably identical, with the activities of public figures being inherently newsworthy and of public interest. See 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 9.7, at 688 (1956).

62. W. PROSSER, *supra* note 16, § 118, at 822.

63. See, e.g., *Gill v. Hearst Publ. Co.*, 40 Cal. 2d 234, 253 P.2d 441 (1953) (couple photographed in affectionate embrace in public); *Hull v. Curtis Publ. Co.*, 182 Pa. Super. 86, 125 A.2d 644 (1956) (photograph of police officers beating prisoner roughly); Silver, *Privacy and the First Amendment*, 34 *FORDHAM L. REV.* 553 (1966).

64. 385 U.S. 374 (1967); see Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 *TEX. L. REV.* 611 (1968).

65. The facts of *Hill* suggest that the public disclosure of private facts, rather than the false light, was the real concern of the plaintiffs. It is likely that their complaint took the former form because of the favorable New York statute and precedents and because they hoped that the state law privilege for matters of public interest would carry less weight in a false light context.

66. *Hill v. Hayes*, 18 App. Div. 2d 485, 240 N.Y.S.2d 286 (1963), *aff'd*, 15 N.Y.2d 986, 207 N.E.2d 604, 260 N.Y.S.2d 7 (1965), *amended*, 16 N.Y.2d 658, 209 N.E.2d 282, 261 N.Y.S.2d 289 (1965).

67. 376 U.S. 254 (1964).

whose only newsworthy activity had been involuntary and had occurred three years prior to the publication. Thus the Court shifted its focus from the public *status* of the plaintiff to the public *interest* in the occurrence.⁶⁸ In addition, the Court expanded the application of the first amendment from a libel case (in which truth would normally be a defense) to a privacy case (in at least some forms of which truth is normally irrelevant).⁶⁹ The actual malice exception, which excludes from first amendment coverage statements that are knowingly false or made in reckless disregard for truth,⁷⁰ makes sense in false light cases because they are similar to libel in the sense of having falsity as an essential element. Presumably *Hill's* malice exception is irrelevant to cases of public disclosure of private facts because in those cases the state decisions recognize that the plaintiff has been wronged irrespective of the truthfulness of the publication.⁷¹

This is not to say that the first amendment has no application to otherwise tortious public disclosures of private facts. Although the Court in *Hill* expressly left this matter for further development,⁷² the state law background of this branch of the privacy tort is so laden with first amendment references that it is unrealistic to suppose that the Supreme Court will exempt it from constitutional coverage. On the other hand, the application of an actual malice rule to public disclosure cases is nonsensical, and a holding that truth is an absolute constitutional defense would destroy this branch of the tort entirely. Perhaps the most probable approach is for the Court simply to adopt the state holdings, rather than to attempt to rewrite them as it did for libel and false light in *Sullivan* and *Hill*.⁷³

68. See Lehmann, *Triangulating the Limits on the Tort of Invasion of Privacy: The Development of the Remedy in Light of the Expansion of Constitutional Privilege*, 3 HASTINGS CONST. L.Q. 543, 566-67 (1976).

69. *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931) (publication of information contained in records of a previous trial held not to violate privacy rights).

70. 385 U.S. at 387. The phrase "reckless disregard" was subsequently defined as a "high degree of awareness of . . . probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), and as "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," *Curtis Publ. Co. v. Butts*, 388 U.S. 130, 158 (1967).

71. By its own terms, the decision in *Hill* appears limited to false light cases. 385 U.S. 374, 383 n.7; see *Cox Broadcasting v. Cohn*, 420 U.S. 469, 491 (1975).

72. 385 U.S. at 383 n.7.

73. See Comment, *An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases*, 124 U. PA. L. REV. 1385 (1976). A balancing approach was taken by the court in *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), involving a *Sports Illustrated* story about a California surfer that disclosed rather intimate personal details not directly pertinent to his concededly newsworthy surfing activities. In a suit for public disclosure of private facts the court as a matter of constitutional law adopted the state law privilege rules of RESTATEMENT (SECOND) OF TORTS §

Whatever the status of the constitutional privilege publicly to disclose private facts involving public figures or the public interest, it is clear that the cases discussed above do not weaken the privilege as it has developed in state law.⁷⁴ Both categories of privilege—public figures and public interest—are relevant to the analysis of secrecy in land ownership. As already suggested,⁷⁵ it may be the very prominence of the plaintiff that leads him to wish to conceal his ownership of particular land or buildings; yet the privilege doctrine suggests that celebrity status and secrecy are incompatible and that his action for public disclosure of allegedly private facts concerning land or ownership would be barred. One might suppose that to earn the privilege, the disclosures ought to have some

652D (Tent. Draft No. 21, 1975) and held the publication of the nonpublic matters tortious. See 29 VAND. L. REV. 870 (1976).

The impact of *Hill* has been severely restricted by the Court along another dimension by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *Gertz* was an attorney hired to bring a civil action against a Chicago policeman accused of unjustifiably killing a youth. The defendant's magazine published an article about the case which falsely accused *Gertz* of various Communist associations and depicted him as the architect of a "frame up" of the policeman. *Gertz* brought a libel action and won a jury award of \$50,000. On certiorari, the defendant argued that the article had been published without actual malice and thus was privileged under *Sullivan*.

The Court conceded that there was no evidence of actual malice but nonetheless rejected Welch's defense. In doing so, it apparently abandoned the distinction between matters of public and private interest that had been adopted in *Hill*. Instead, it found the critical distinction to be the status of the plaintiff as a public or a private figure—a reversion to the test articulated in *Sullivan*. If *Gertz* had been deemed a public figure, the Court indicated that he would have had to show actual malice. Since he was not, he would be permitted to recover upon whatever showing of evidence was required by state law, but with the proviso that *some* degree of fault on the part of the defendant must be shown. Since traditional libel law required no evidence of negligence or other fault, the Court has apparently rewritten this entire body of law. Moreover, fault seems to be required whether or not the subject matter is of public interest. See Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976).

Presumably the same approach would now be taken by the Court in a "false light" privacy case like *Hill*. Rather clearly the Hills were "private persons" under the Court's definition in *Gertz*, and on that basis might be able to recover from Time, Inc., merely by showing its negligence. The opinion in *Gertz*, however, does not make this explicit. Moreover, Justice Powell's opinion in *Gertz* cautions that "different considerations" might apply to a published statement the substance of which did not "warn a reasonably prudent editor or broadcaster of its defamatory potential." 418 U.S. at 348. One might infer that in such a case (and *Hill* is of this type, since the statements in *Hill* were laudatory, though false) the publisher, not having the benefit of a warning from the content of the statements, would be protected by the full weight of the *Sullivan* doctrine notwithstanding the private status of the plaintiffs.

The holding of *Gertz* seems confused, and its application to privacy cases uncertain. Nothing in the opinion seems to contradict the conclusion reached in the text that *Sullivan* and *Hill* are inapplicable to the public disclosure of private facts.

74. It is apparent that there is no public figure/public interest privilege for violations of the right of privacy which involve appropriation (since most of these cases involve overtly public persons) or intrusion (which need not even result in publication to be tortious). The privilege is applicable only in false light and public disclosure of private fact cases.

75. See text at note 3 *supra*.

relevance to the public side of the plaintiff's life. Nonetheless, in cases involving "voluntary" celebrities who have intentionally sought publicity, the rule seems to be that almost anything may be disclosed.⁷⁶ The plaintiff's status as a famous actor might well justify disclosures about his ownership of an illegal gambling den or slum apartments. By contrast, persons who have not sought notoriety, but are involved in newsworthy events, have lost their protection against public disclosures only with respect to the events in question and presumably some reasonable amount of background information.⁷⁷

In cases in which the plaintiff is not a public personality, then, the question becomes one of defining "newsworthiness" or the "public interest." Clearly these terms are not confined to reporting of current events, but encompass the general process of informing and even entertaining the public.⁷⁸ In addition, they cannot realistically be regarded as absolutes, such that the privilege would surely exist if a public interest were present and not if it were absent. Rather, the courts are increasingly employing a balancing approach to resolve the competing interests of the publisher and public on the one hand and the noncelebrity plaintiff on the other. A good illustration is *Goldman v. Time, Inc.*,⁷⁹ in which Life magazine published a story on young Americans travelling in Europe. The plaintiffs were interviewed by a Life reporter in Crete and were featured in the story, which they alleged cast them in a false light. As one ground for rejection of the plaintiffs' claim, the court, applying California law, weighed the social value of the facts published plus the degree of voluntariness of the plaintiffs' cooperation with the publisher, against the depth of the article's intrusion into private affairs. This sort of judicial technique may be criticized as lacking precision and predictability, but

76. Thus, detailed and unflattering biographies of such persons are held privileged. *See, e.g.*, *Sidis v. F-R Publ. Corp.*, 113 F.2d 806 (2d Cir. 1940) (biography of former child mathematical prodigy); *Koussevitsky v. Allen, Towne & Heath, Inc.*, 188 Misc. 479, 68 N.Y.S.2d 779 (Sup. Ct.), *aff'd*, 272 App. Div. 759, 69 N.Y.S.2d 432, *appeal denied*, 272 App. Div. 794, 71 N.Y.S.2d 712 (1947) (biography of famous symphony conductor); *Corabi v. Curtis Publ. Co.*, 441 Pa. 432, 273 A.2d 899 (1971) (biography of "Tiger Lil," a well-known entertainer and accused burglar); *W. PROSSER*, *supra* note 16, § 118, at 829.

77. *See, e.g.*, *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975); *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P.2d 670 (1951) (film portrayal of the military life of a soldier who played a prominent part in the assault on Iwo Jima held to be privileged); *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931). The passage of time since the newsworthy event may further attenuate the privilege unless the event itself was unusually spectacular. *See Briscoe v. Reader's Digest Ass'n*, 4 Cal. 2d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

78. *Carlisle v. Fawcett Publ., Inc.*, 201 Cal. App. 2d 732, 20 Cal. Rptr. 405 (1962); *Paulsen v. Personality Posters, Inc.*, 59 Misc. 2d 444, 299 N.Y.S.2d 501 (1968).

79. 336 F. Supp. 133 (N.D. Cal. 1971).

given the enormous range of facts that arise in privacy cases, it is doubtful that any better rule can be formulated. Indeed, most privacy decisions probably reflect a similar process, although often it is unarticulated.

How should the public interest privilege be applied to facts about land or its ownership? If activities on the land are illegal or noxious to society, the newsworthiness of a report about them would not be difficult to establish.⁸⁰ Suppose, however, that the facts in issue are more mundane and are interesting only to those who might consider purchasing or renting the land. Can there be a general public interest in the publication of such market-related facts? In an economic system such as that of the United States, based on free transactions in a competitive market, the public interest in the availability of such information seems incontrovertible. The specific interest thus served is that of optimal allocation of society's resources.⁸¹ To the extent that relevant information is withheld, prices paid may not accurately reflect the value and potential productivity of the land being transferred; some parties will suffer financial disaster while others will enjoy windfalls, but the economy as a whole may be the loser.⁸² The common law privilege for publication of matters of public interest surely should be extended to cover such information even when the plaintiff has not cooperated in the publication, except when highly personal or intrusive material is included.

Moreover, there is strong authority that the first amendment directly protects such market-related publications. In *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁸³ the Supreme Court struck

80. See *Bergman v. Stein*, 404 F. Supp. 287 (S.D.N.Y. 1975) (published story on allegedly unethical conduct of plaintiff's nursing home business held privileged).

81. See note 30 & accompanying text *supra*.

82. The classic model of the competitive market assumes that a single fungible product is traded, so knowledge by the participants of its quality becomes irrelevant. WYSTRA, *INTRODUCTORY ECONOMICS* 358-60 (1971). In markets with differentiated products (and real estate is perhaps the most varied product imaginable), an assumption of all knowledge of the product's quality by all participants would appear to be a reasonable substitute. Whether or not market efficiency will be maximized by provision of such widespread knowledge will depend on the cost of obtaining the information. Most economic research on information costs and their impact on markets has been focused on information concerning price rather than quality. See, e.g., Hirschleifer, *Where Are We in the Theory of Information?*, 63 AM. ECON. REV. PAPERS & PROC. 31 (1973); Rothschild, *Models of Market Organization with Imperfect Information: A Survey*, 81 J. POL. ECON. 1283 (1973). But irrespective of the impact on market efficiency of information-gathering, it appears indisputable that the seller of land cannot reasonably object to potential buyers' efforts to become informed about its quality. If they have concluded that the cost of the information is worth its benefits, and if that cost is theirs and not the seller's, his only remaining ground for resistance can be his hope of pulling off an essentially unfair transaction.

83. 425 U.S. 748 (1976).

down state restrictions on price advertising of prescription drugs. Justice Blackmun's opinion for the majority notes:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.⁸⁴

In 1977, the Court in *Linmark Associates, Inc. v. Township of Wil-lingboro*⁸⁵ applied these same principles to information regarding real property, striking down a town ordinance that prohibited the posting of "for sale" signs. Justice Marshall's opinion for a unanimous Court relied heavily on *Virginia Board of Pharmacy*. The Court held that the town's ostensible interest in preventing rapid racial turnover was insufficient to override the first amendment right of home buyers and sellers to convey and receive the market information that "for sale" signs transmitted.⁸⁶ Other types of relevant information, such as that relating to price, quality, and title, should be equally entitled to constitutional protection. A balancing of the interests is obviously necessary, but absent some highly offensive, embarrassing, or misleading element, the assertion of first amendment protection is entitled to great weight.

5. *The public records privilege*

Paralleling the public figure/public interest privilege, the privilege to report and publish facts contained in official records and proceedings has

84. *Id.* at 765.

85. 431 U.S. 85 (1977).

86. The Court noted that there was little evidence of "panic selling" in the town and implied that such evidence might have led to a different result. *Id.* at 95 n.9. Thus, the Court declined to overrule *Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161 (7th Cir. 1974), in which "panic selling" has been proved.

been recognized by state courts for some years.⁸⁷ Several earlier decisions of the Supreme Court had suggested a first amendment basis for the privilege,⁸⁸ but this was not confirmed by the Supreme Court until 1975 in *Cox Broadcasting Corp. v. Cohn*.⁸⁹ The *Cohn* case grew out of an attempt by the Georgia legislature to limit the public records privilege by making it a misdemeanor to publish the identity of a rape victim.⁹⁰ The defendant's reporter, who learned Miss Cohn's name from the indictments of those charged with her rape and murder, identified her by name in a television news report. Her father filed an invasion of privacy suit on the basis of the statute. The Georgia Supreme Court held that in light of the statute the defendant had no privilege to identify the victim. The United States Supreme Court reversed, holding that the first amendment mandates a privilege to publish the contents of official public records and documents.⁹¹

The case has striking implications for those who publish information about land ownership and use, although there are no decisions applying the holding in this context.⁹² To the extent that ownership data is found in public records, it appears to be constitutionally privileged. Similarly, citations naming building owners for violations of housing and building codes are ordinarily public records and presumably privileged. Of course, the available records may not be as informative as the seeker might wish; landowners still have various techniques available to disguise their ownership.⁹³ It is conceivable, however, that *Cohn* could be extended to cover all of the types of data normally contained in public records, even though in a given case the owner had used a trust or nominee to conceal his identity and the defendant had discovered his identity by other means. This interpretation of *Cohn* would amount to a rule that disclosures concerning landowners' identities and perhaps some basic data about land use are inherently privileged, irrespective of the actual source of the in-

87. *Firth v. Associated Press*, 176 F. Supp. 871 (D.S.C. 1959); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957 (D. Minn. 1948); *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 95 P.2d 491 (1939). See Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 216-17 (1890).

88. See, e.g., *Craig v. Harney*, 331 U.S. 367, 374 (1947).

89. 420 U.S. 469 (1975).

90. GA. CODE ANN. § 26-9901 (1977). A similar statute was upheld in *State v. Evjue*, 253 Wis. 146, 33 N.W.2d 305 (1948).

91. This holding is consistent with a prior state decision on similar facts. *Hubbard v. Journal Publ. Co.*, 69 N.M. 473, 363 P.2d 147 (1962).

92. One pre-*Cohn* case that applies the privilege to property-related records is *Bell v. Courier-Journal & Louisville Times Co.*, 402 S.W.2d 84 (Ky. 1966) (published statement that judge's property taxes were delinquent).

93. See text accompanying notes 7-13 *supra*.

formation. Although such a holding would clearly be an expansion of *Cohn*, it would be a plausible one.

On the other hand, *Cohn* may be read restrictively in at least two respects that are relevant to the present analysis. First, it may be argued that the holding is applicable only when the public interest is related to some currently newsworthy event. The broadcast involved in *Cohn* occurred at the time of the judicial hearing, only eight months after the crime was committed. Yet no such limitation inheres in the language of *Cohn*. On the contrary, the Court seems to create a privilege for any and all public records, since "[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served."⁹⁴ The Kansas Supreme Court concluded that currency of the event was not a requirement and applied the holding of *Cohn* to a newspaper story about the alleged misfeasance in office of a policeman who had retired ten years earlier.⁹⁵ Presumably land records, no matter how ancient, would be eligible for the same treatment.

A second limitation that may be implicit in *Cohn* is the power of the state to declare certain records to be nonpublic. The opinion in *Cohn* expressly avoids comment on the validity of this technique.⁹⁶ Subsequent state cases have held, however, that there is such a power and that no privilege exists to publish facts appearing in nonpublic governmental documents if the publication is in other respects a violation of the right of privacy.⁹⁷ This position is, of course, subject to the standard enunciated in *Time, Inc. v. Hill* and to further comment by the Supreme Court. Moreover, there seems to be no present trend among the states toward making records of land use or ownership nonpublic.⁹⁸ Neverthe-

94. 420 U.S. at 495.

95. *Rawlins v. Hutchinson Publ. Co.*, 218 Kan. 295, 543 P.2d 988 (1975). If this holding is correct, such cases as *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 2d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971), which allowed the plaintiff to recover because the privilege was lost due to the lapse of time, would be overruled to the extent that the information published was contained in public records.

96. 420 U.S. at 496 n.26.

97. *Deaton v. Delta Democrat Publ. Co.*, 236 So. 2d 471 (1976) (identifying children as retarded); *Philadelphia Newspapers, Inc. v. Disciplinary Bd.*, 468 Pa. 382, 363 A.2d 779 (1976) (hearing on reinstatement of attorney to the bar); *McLaughlin v. Philadelphia Newspapers, Inc.*, 465 Pa. 104, 348 A.2d 376 (1975) (disbarment proceedings); *Houston Chronicle Publ. Co. v. City of Houston*, 531 S.W.2d 177 (Tex. 1975) (police "rap sheet"). See also *Doe v. McMillan*, 412 U.S. 306, 328 (1973) (Douglas, J., concurring) (parents have constitutional right to enjoin publication of a report on school discipline problems that names their children).

98. Indeed, a contrary trend may be developing. See Real Estate Settlement Procedures Act of 1974 § 13, 12 U.S.C.A. § 2611 (1976) (provided for establishment of a land parcel recordation

less, the possibility exists that states could place some land records that are now public beyond the reach of *Cohn*.

B. *The Geophysical Exploration Cases*

Suppose A owns land that is located in an oil-producing area. A's land is yet unexplored for petroleum potential. B, who may be an oil company employee, a newspaperman, a government agent, or merely a busybody, conducts surveys or tests that indicate an absence of oil on A's property. The tests are carried out by "shooting" explosive charges and measuring the sonic echoes, by magnetic measurements, or by whatever other technological means will produce the desired information. They involve no entry on A's land; B works from test sites on adjacent public roads or neighboring property. Upon completion of his tests, B publishes to the world the fact that A's land is barren of oil. As a result, the market value of the land is drastically reduced. May A recover damages from B, and if so, by what measure?

Some obvious variants of this fact situation must first be eliminated. If the seismic tests have produced physical damage to A's land or improvements, recovery for the harm is certainly proper.⁹⁹ If B has A's permission to make the tests, A can hardly complain.¹⁰⁰ If B is A's present or former employee or has a fiduciary relationship with him that implies a duty of confidentiality, B's breach of that duty by disclosure of the facts to others is wrongful and actionable.¹⁰¹ If B's statements to the world are false, A may be able to develop a case based on commercial disparagement or the like.¹⁰²

Consider, however, the unadorned case in which none of these variants appears. The problem is purely one of information and the defendant's means of obtaining it. Rather surprisingly, virtually every case considering the matter has concluded that the landowner has in principle some right of action,¹⁰³ although in numerous instances he has failed to recover

system, on demonstration basis, in various areas of United States); D. MOYER & K. FISHER, *LAND PARCEL IDENTIFIERS FOR INFORMATION SYSTEMS* (1973); Cook, *Land Law Reform: A Modern Computerized System of Land Records*, 36 U. CIN. L. REV. 385 (1969).

99. *Leonard v. Texaco, Inc.*, 422 S.W.2d 160 (Tex. 1967). See generally, Annot., 20 A.L.R.2d 1372 (1951).

100. Common law trespass, for example, is defined as an *unauthorized* entry on another's land. W. PROSSER, *supra* note 16, at 63.

101. *Tlapak v. Chevron Oil Co.*, 407 F.2d 1129 (8th Cir. 1969); *Ohio Oil Co. v. Sharp*, 135 F.2d 303 (10th Cir. 1943).

102. See text accompanying notes 115-21 *infra*.

103. See 2 AMERICAN LAW OF PROPERTY §10.9, at 534-36 (A.J. Casner ed. 1952); Annot., 67 A.L.R.2d 444 (1959). See generally Hawkins, *The Geophysical Trespasser and Negligent Geophysical Explorer*, 29 TEX. L. REV. 310 (1951).

because of some defect in proof.¹⁰⁴ The decisions frequently rest on the assertion that the exclusive right to explore one's own land is a property right, and therefore, the unauthorized exploration by another is a trespass.¹⁰⁵ This sort of reasoning is, of course, circular; the right to explore is a property right only if it is an interest the courts will protect by sanctioning those who invade it. Rather obviously, some better explanation of the result the courts reach is needed.

The measures of damages typically employed in these cases strongly suggest that the interest being protected is not in land, but in information. Most commonly, the courts have measured damages by taking testimony as to the normal fee in the vicinity for a "shooting permit" (the right to make geologic tests, but no more) or a "selection lease" (the right to make tests, coupled with an option for the explorer to lease such portions of the land as he then desires on previously agreed terms).¹⁰⁶ Plainly, one who purchases a shooting permit is buying the right to information and nothing more. A few courts have suggested that the landowner is entitled to further damages, measured by the diminution of market value of the land resulting from the disclosure of the explorer's findings.¹⁰⁷ This measure may be viewed as a sort of consequential damage flowing from the misappropriation of the information. Whichever measure is used, it is clearly the right to information that is at issue; to cast the problem in real property terms is not helpful.

At first blush, it seems attractive to apply the right of privacy concept to the geological exploration cases, for they bear similarities to three of the types of privacy cases discussed above: appropriation, intrusion, and public disclosure of private facts. They are like appropriation cases in the sense that the explorer is usually carrying on his activities for a commercial purpose; he expects to sell the information he gleans or to use it himself in arriving at a sound bid or offer for the mineral rights in the plaintiff's land. Yet these cases do not fit the appropriation category perfectly since appropriation involves the plaintiff's name or likeness.¹⁰⁸

104. See, e.g., *Kennedy v. General Geophysical Co.*, 213 S.W.2d 707 (Tex. Ct. App. 1948). In cases in which the oil or mineral interest has been severed from the surface estate, it is usually held that the subsurface rather than the surface owner is the proper plaintiff. *Tinsley v. Seismic Explorations, Inc.*, 111 So. 2d 834 (La. Ct. of App. 1959); *Shell Petroleum Corp. v. Puckett*, 29 S.W.2d 809 (Tex. Ct. App. 1930).

105. See, e.g., *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586 (5th Cir. 1957).

106. *Shell Petroleum Co. v. Scully*, 71 F.2d 772 (5th Cir. 1934); *Layne La. Co. v. Superior Oil Co.*, 209 La. 1014, 26 So. 2d 20 (1946); *Harrell v. F. H. Vahsling, Inc.*, 248 S.W.2d 762 (Tex. Ct. App. 1952).

107. *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586 (5th Cir. 1957); *Angelloz v. Humble Oil & Ref. Co.*, 196 La. 604, 199 So. 656 (1940).

108. See notes 45-52 & accompanying text *supra*.

while the exploration of land involves only its physical characteristics. The owner's name is usually well known or is a matter of public record, but it is not being exploited by the defendant.

Unauthorized exploration is also similar to the intrusion cases in the sense that electronic or other scientific means are used to investigate and acquire information. In the typical exploration case, however, nothing occurs that would offend the personal sensibilities of the plaintiff. If shock or sound waves are employed, they may well be so weak as to be unnoticed even by persons on the land. Indeed, the land is frequently unoccupied and the owner does not learn of the intrusion until later. A few cases have extended the privacy-intrusion concept to information about the plaintiff's bank accounts,¹⁰⁹ but in these cases the facts seem to raise a considerably stronger expectation of confidentiality than is the case with the physical characteristics of land. It is similarly difficult to fit the exploration cases into the category of public disclosure of private facts. The problem is that the facts in question are really not very private. There is nothing intimate or embarrassing about having the world know that there is (or is not) oil under one's land.¹¹⁰

Thus, although the tort law of privacy provides a more useful mode of analysis for "geophysical trespass" cases than does the law of trespass, it is clear that in the usual case there is no breach of the right of privacy. For the reasons of equity and economic efficiency already discussed,¹¹¹ the privacy concept should not be extended to cover these cases, and the trespass holdings should be overruled. The preferable rule would allow exploration and publication of results by anyone willing to invest his energies in doing so, with no ensuing liability on any theory. Some caution, however, seems necessary here. Obviously, physical damage by the explorer should give rise to a money judgment for the plaintiff. Moreover, our common law conception of the exclusive right to possession associated with ownership of land is so powerful that a court should hold the explorer liable, at least for nominal damages (and perhaps for

109. Prosser cites *Zimmerman v. Wilson*, 81 F.2d 847 (3d Cir. 1936) and *Brex v. Smith*, 104 N.J. Eq. 481, 146 A. 34 (1929), for this proposition. W. PROSSER, *supra* note 16, § 117, at 808 n.60. Both cases involve injunctions against governmental intrusions, and it is not certain that similar results would follow if the defendants were private parties to whom no fourth amendment liability attached. See *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974), which upholds legislation that would permit governmental scrutiny of private bank accounts but recognizes potential constitutional limits on such activity; see also notes 147-53 & accompanying text *infra*.

110. See *Bergman v. Stein*, 404 F. Supp. 278 (S.D.N.Y. 1975) (details of plaintiff's business not sufficiently private); *Hamilton v. Crown Life Ins. Co.*, 246 Or. 1, 423 P.2d 771 (1967) (fact and amount of widow's life insurance benefits check not sufficiently private).

111. See notes 81-84 & accompanying text *supra*.

punitive damages as well, when motivated by bad faith)¹¹² if he intrudes physically on the plaintiff's land. Finally, it seems equitable to give the landowner a right (albeit nonexclusive) to information about his own land. One who explores it by remote devices should be obligated to share his results with the owner.¹¹³ Otherwise, a misallocation of resources might well occur, but with reversed roles; the owner would be ignorant and the purchaser might successfully underbid the real value substantially. The owner ought to be permitted to demand the purchaser's information and to get a court order compelling its delivery if it is not provided voluntarily. Enforcement of this rule may not be simple, since in the case of oil and mineral deposits, soundings taken with respect to one parcel of land may be almost meaningless unless fitted into a broader pattern of data taken from other parcels in the vicinity.¹¹⁴ It seems appropriate to give the landowner-plaintiff the information about his own land without charge, but to compel him to pay a reasonable contribution toward the defendant's expenses as to other relevant information needed to provide a comprehensive picture of the value of the plaintiff's land.

Although this discussion has centered on mineral deposits, prospective buyers sometimes wish to obtain other types of information about land by means of appraisals, expert inspections, or the like. Generally, such information cannot be collected without the current owner's permission or an overt and direct trespass. It would be a great departure from our customary view of exclusivity in ownership to hold that the owner has a duty to grant such permission, or to deny recovery if a trespass is committed by the buyer or his agents. In the great bulk of cases such questions will be settled amicably by contract or informal agreement between the parties. Once the information has been obtained, however, the foregoing analysis suggests that the prospective buyer of the land may pass it on to others with impunity unless he has contracted not to do so. It is socially desirable to encourage dissemination of such information, since otherwise future prospective purchasers will either have to duplicate the expense of the inspections or take the risk of paying an unreasonably high price for defective property. That the owner should also have a right to obtain copies of the relevant reports and data without cost also seems entirely justified by public policy. Unfortunately, there are no cases dealing with these problems.

112. *Geophysical Serv., Inc. v. Thigpen*, 233 Miss. 454, 102 So. 2d 423 (1958); *Oden v. Russell*, 207 Okla. 570, 251 P.2d 184 (1952); *Annot.*, 111 A.L.R. 91 (1937).

113. The defendant's offer to share the information with the plaintiff was held to be a factor mitigating damages in *Shell Petroleum Corp. v. Scully*, 71 F.2d 772 (5th Cir. 1934).

114. See *Hawkins*, *supra* note 103, at 315.

C. Business Torts

Conceivably, one who reveals information about another's land may become liable to the owner under one of the so-called business torts: injurious falsehood and interference with contract or economic advantage. The term injurious falsehood, as used in current drafts of the *Restatement of Torts*,¹¹⁵ includes two types of actions that were previously considered to be separate, though related. These are slander of title and commercial disparagement. The former obviously refers to false and derogatory statements about the plaintiff's title to property, and the latter to such statements about the property's quality.¹¹⁶ Injurious falsehood comprehends these and a few other, less common, fact situations.¹¹⁷ The matter need not detain us, however, since it is clear that one element of the tort is falsehood; a truthful statement cannot result in liability.¹¹⁸ Hence, if the defendant's only behavior is to acquire and publish or report information, this tort need not concern him.

The matter is not so simple with regard to interference with contract or economic advantage,¹¹⁹ however. Suppose an owner has entered into a contract to sell his land or has placed it on the market in the hope of sale. Before a transaction is consummated, however, some third party learns of derogatory information about the quality or title of the property and transmits this knowledge to the prospective buyer or the market at large. As a result, the owner is obliged to forego sale or accept a reduced

115. RESTATEMENT (SECOND) OF TORTS § 623A (Tent. Draft No. 22, 1976); see also Prosser, *Injurious Falsehood: The Basis of Liability*, 59 COLUM. L. REV. 425 (1959).

116. *Wright v. Rogers*, 172 Cal. App. 2d 349, 342 P.2d 447 (1959) (filed unfounded claim for property); *Lehman v. Goldin*, 160 Fla. 710, 36 So. 2d 259 (1948) (offered another's land for sale in a contract); *Frega v. Northern N.J. Mortgage Ass'n*, 51 N.J. Super. 531, 143 A.2d 885 (1958) (filed false lien); *Mink Hollow Development Corp. v. New York*, 87 Misc. 2d 61, 384 N.Y.S.2d 373 (1976) (land erroneously described as situated in unapproved subdivision).

117. These residual situations involve false statements, not concerning the quality or title of property and not defamatory, that nonetheless cause harm. Examples are statements about the plaintiff's business or commercial activities or even personal affairs that discourage others from dealing with him or otherwise interfere with his relationships. See W. PROSSER, *supra* note 16, § 128, at 919-20.

118. *Id.* at 920; RESTATEMENT (SECOND) OF TORTS § 623A (Tent. Draft No. 22, 1976). A variety of other privileges also exist, including a possible constitutional privilege under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The other privileges will not be discussed since the privilege of truth is sufficient for present purposes. See generally Note, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 COLUM. L. REV. 963 (1975).

119. See F. HARPER & F. JAMES, *THE LAW OF TORTS* §§ 6.5-6.12 (1956); W. PROSSER, *supra* note 16, §§ 129-30; Harper, *Interference with Contractual Relations*, 47 NW. U.L. REV. 873 (1953). Interference with contractual relations can occur only when the plaintiff and another have already entered into a contract; interference with prospective economic advantage is applicable when no contract has yet been formed.

price. Clearly such verbal persuasion, if it is successful in discouraging the sale, can constitute the tort of interference.¹²⁰ In interference cases, unlike those of injurious falsehood, falsity of the information imparted is not an essential ingredient of the plaintiff's prima facie case. Instead, the key element is the revelation of disparaging information with the intention of injuring the plaintiff.¹²¹

Once such a revelation is proven, the defendant may be able to justify his conduct on any of several grounds. One such justification is "an impersonal or disinterested motive of a laudable character."¹²² This defense is built primarily on public policy; it allows interference for the public good.¹²³ A more common defense is the privilege to give honest advice. The advice need not even be accurate; the sole requirement is that it be given in good faith upon a party's request.¹²⁴ Finally, among the common justifications, a person may relay information that may induce a party to breach a contract, if doing so will protect the actor's pre-existing economic interest.¹²⁵

Whether truth can be asserted as a defense to a suit for interference is an issue on which authority is surprisingly meager. Dean Prosser suggests that

the mere statement of existing facts, or assembling of information in such a way that the party persuaded recognizes it as a reason for

120. RESTATEMENT OF TORTS § 766, Comment f (1939). Virtually identical principles apply to both interference with economic advantages and interference with contract. *Id.* Comment b.

121. Originally courts held that the intention to interfere had to be malicious in order to constitute the tort, *see, e.g.,* *Tumley v. Gye*, 118 Eng. Rep. 749 (1853), and early cases sought to find actual ill will. *See, e.g.,* *Aikens v. Wisconsin*, 195 U.S. 194 (1904). As business transactions became more complex, however, the malice concept evolved into an intent to profit at the plaintiff's expense, *see, e.g.,* *Carter v. Knapp Motor Co.*, 243 Ala. 622, 11 So. 2d 383 (1943); *Schechter v. Friedman*, 141 N.J. Eq. 318, 57 A.2d 251 (1948), and later into merely the intent to interfere with the plaintiff's commercial dealing. *Meyer v. Washington Times Co.*, 76 F.2d 988 (D.C. Cir. 1935); *Reichman v. Drake*, 89 Ohio App. 222, 100 N.E.2d 533 (1951). The tort presently remains in this last form, which interprets malice as merely demanding that the act be intentional. Thus, a negligent interference would not be a sufficient basis for liability. This limitation appears to be due to the realization that in a society in which so many transactions are closely interlocked, unintentional interferences are practically inevitable and often unavoidable. *See* *Carpenter, Interference with Contractual Relations*, 41 HARV. L. REV. 728 (1928).

122. W. PROSSER, *supra* note 16, § 129, at 943.

123. Examples of interference for the public good are rare. One of the few is found in *Kuryen Publ. Co. v. Messmer*, 162 Wis. 565, 156 N.W. 948 (1916), in which a court held that a church, which had forbade its members from purchasing or reading the plaintiff's newspaper because it was "sinful," was not liable to the newspaper.

124. *Delaware, L. & W.R.R. v. Switchmen's Union*, 158 F. 541 (1907) (union advised employees to go on strike, in violation of employment contract); *Coakley v. Degner*, 191 Wis. 170, 210 N.W. 359 (1926).

125. *Meason v. Ralston Purina Co.*, 56 Ariz. 291, 107 P.2d 224 (1940); *O'Brien v. Western Union Tel. Co.*, 62 Wash. 598, 114 P. 441 (1911).

breaking the contract is not enough [to impose liability for interference], so long as the defendant creates no added reason and exerts no other influence or pressure by his conduct.¹²⁶

This view is sound and should be followed simply out of deference to a policy encouraging the free flow of information, but it is difficult to find either support or contradiction for it in the cases.¹²⁷

Additionally, there is the real possibility of a first amendment privilege along the lines of *Sullivan*¹²⁸ and *Gertz*.¹²⁹ Several conceptual problems arise, however, in transferring the reasoning of these libel and false light cases into the arena of interference with contract or prospective advantage. One difficulty is the sporadic tendency of the Court to grant less than full weight to the first amendment in protecting commercial or business speech.¹³⁰ The defendant in an interference case may well have communicated the bad news about the plaintiff's property out of purely commercial motives, yet it is clear that such news may well be of crucial importance to prospective buyers of the property and have critical economic and even social consequences for them.¹³¹ Although the significance of the defendant's speech will vary with the specific facts, it would be unwise and unreasonable to assume a priori that such communication is entitled only to second-class first amendment protection.

126. W. PROSSER, *supra* note 16, § 129, at 934-35.

127. See *Martin v. Texaco, Inc.*, 304 F. Supp. 498 (S.D. Miss. 1969); *Jensen v. Lundorff*, 258 Minn. 275, 103 N.W.2d 887 (1960); *Sorenson v. Chevrolet Motor Co.*, 171 Minn. 260, 214 N.W. 754 (1927) (Stone, J., dissenting).

128. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See notes 67 & accompanying text *supra*.

129. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), discussed at note 73 *supra*.

130. The view that commercial speech is entitled to little or no first amendment protection originated in *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (upholding police restraint of distributor of commercial handbills on public street). See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (upholding ordinance that prohibited sex-designated help-wanted newspaper advertisements). In *Pebble Brook, Inc. v. Smith*, 140 N.J. Super. 273, 356 A.2d 48 (1976), the court held that the defendants' picketing of the plaintiff developer's project was protected by the first amendment and refused to enjoin it; yet it implied that the defendants might still be liable for interference with contractual advantage. This implication seems both gratuitous and erroneous.

131.

As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen if not keener by far, than his interest in the day's most urgent political debate. . . . When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763-64 (1976) (state prohibition on advertising of prescription drugs held invalid).

The Court's recent decisions regarding advertising seem to recognize generous constitutional protection for truthful commercial speech.¹³²

A second problem is that, if truth is not a state law defense to the tort of interference, the "actual malice" standard the Court has employed in false light and defamation cases cannot readily be applied. In this respect the tort of interference is like the public disclosure branch of the law of privacy;¹³³ the gravamen is not the promulgation of error, but the promulgation of information itself. Two approaches to this situation seem open to the Court. One is to follow the tack predicted above for the public disclosure privacy cases—to balance case by case the harm to the plaintiff against the benefit to society flowing from the publication.¹³⁴ But balancing may be unnecessary when the interference merely consists of truthful statements. The tort of interference is not designed to protect against statements of a highly intrusive personal nature the publication of which would denigrate "our basic concept of the essential dignity and worth of every human being."¹³⁵ In other words, it is not the privacy interests of the plaintiff that are being protected in interference cases, but only his economic interests, which would be entitled to considerably less weight as against the free speech clause of the first amendment. Thus the preferable approach would be for the Court to declare that as a matter of first amendment right, truth is a defense to an interference complaint.¹³⁶

In a sense, such a holding would be a rather mild assertion of the first amendment by comparison with *Gertz*, which itself represents a retrenchment from earlier, more vigorous decisions.¹³⁷ In *Gertz* the Court imposed the negligence of the defendant as a minimum element that all states must recognize in false light cases involving nonpublic plaintiffs. A fortiori, this holding also makes falsity an element in such cases, for it is impossible to tell the truth negligently. The Court omitted any discussion of truth as a constitutionally required defense simply because it was already required under state law. In the context of the tort of interference, it is not so clear that state law requires falsity, but in view of the non-intimate nature of the interest that the tort is designed to protect, it would

132. *Id.*; *Bigelow v. Virginia*, 421 U.S. 809 (1975) (state statute prohibiting the advertisement of abortions held invalid).

133. See text accompanying note 73 *supra*.

134. *Id.*

135. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974), quoting Justice Stewart in *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966).

136. Cf. Note, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 COLUM. L. REV. 963, 983 (1975) (recovery of corporation in defamation action should be limited to provable pecuniary loss).

137. See, e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

be eminently reasonable for the Court to declare truth to be a constitutionally mandatory defense.¹³⁸

D. Constitutional Limitations on Governmental Invasions of Privacy

If a state or the federal government collects, assembles, and disseminates to the public information about land ownership or use, does that activity violate some concept of privacy embodied in the United States Constitution? This issue will be analyzed here, but it substantially overlaps the problems discussed in Part III of this article dealing with governmentally required disclosure by landowners themselves.¹³⁹ Presumably the constitutional limitations are similar whether the government acts directly or compels the private owner to act to achieve the same result. The present focus, however, is on direct federal or state action.

Although the term "privacy" is not mentioned in the Constitution, the case law has developed at least three privacy-related constitutional rights:¹⁴⁰ the right to be free from governmental interference and regulation in "matters relating to marriage, procreation, contraception, family relationship, and child rearing and education;"¹⁴¹ the protection of individuals against unreasonable searches;¹⁴² and the right to prevent the government from publishing personal data it has collected from a citizen.¹⁴³ For the purposes of this article, the third group of constitutional

138. The distinction between true and false statements for purposes of first amendment protection was recognized by the Supreme Court in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), in which the Court stated, "Untruthful speech, commercial or otherwise, has never been protected for its own sake." *Id.* at 771.

139. See notes 212-67 & accompanying text *infra*.

140. The three categories discussed in the text are not exhaustive of the various ways in which the Supreme Court has used the term "privacy." For example, in *Cohen v. California*, 403 U.S. 15 (1971), the Court referred to one's interest in avoiding undesired and unwarranted exposure to the speech of others as a "privacy interest."

141. *Whalen v. Roe*, 429 U.S. 589, 600 n.26 (1977), quoting *Paul v. Davis*, 424 U.S. 693, 713 (1976).

142. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST., amend. IV. See, e.g., *United States v. United States Dist. Court (Keith)*, 407 U.S. 297 (1972) (warrantless wiretaps for domestic security purposes violate fourth amendment); *Katz v. United States*, 389 U.S. 347 (1967) (warrantless attachment of listening device to telephone booth violated fourth amendment); *York v. Story*, 324 F.2d 450 (9th Cir. 1963), cert. denied, 376 U.S. 939 (1964) (nude photograph taken by police of sexual assault victim violated fourth amendment). Cf. *United States v. White*, 401 U.S. 745 (1971) (transmitting device concealed on person of an informer not violative of fourth amendment). See generally Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1976 AM. B. FOUNDATION RESEARCH J. 1193.

143. Stone, *supra* note 142, at 1207. See also Fried, *Privacy*, 77 YALE L.J. 475 (1968); Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974).

privacy cases is of greatest interest. It is comprised of situations in which the government's interest is clearly informational in nature and in which the method of data collection is open, straightforward, and often defined by a statute, regulation, or specific program. Those attacking such governmental data systems seek judicial support for "the individual's interest in determining for himself when, how, and to what extent information about him is revealed to others."¹⁴⁴ Geoffrey Stone¹⁴⁵ has identified several "sub-interests" that may be served by the individual's control of such information: his sense of individuality and self-dignity, his avoidance of embarrassment, his ability to maintain intimate personal associations with others,¹⁴⁶ and his freedom of thought and expression. To some degree, each of these might be inhibited by untrammelled collection or publication of personal information by the government. Although the fourth amendment may be one source of limitation upon government in this respect, the first, fifth, and ninth amendments are often asserted as well.

In the last three years, a number of Supreme Court decisions have cast light on the dimensions of the constitutional right to informational privacy, although none has struck down a governmental information system. The first case germane to our inquiry is *California Bankers Ass'n v. Shultz*,¹⁴⁷ in which bankers and depositors sought a declaration of the unconstitutionality of the Bank Secrecy Act of 1970.¹⁴⁸ The Act required banks to maintain certain records and to report to the Secretary of the Treasury all instruments transmitting funds exceeding \$5,000 into or out of the United States. Additionally, under broad statutory language, the Secretary promulgated regulations that required the reporting of all domestic bank transactions involving more than \$10,000 in currency.¹⁴⁹ The Court, in an opinion by Justice Rehnquist, held that the reporting requirements did not violate the fourth amendment rights of the banks

144. Stone, *supra* note 142, at 1207-08.

145. *Id.*

146. In *Bates v. City of Little Rock*, 361 U.S. 516 (1960) and *NAACP v. Alabama*, 357 U.S. 449 (1958), the Court disapproved data collection systems that attempted to elicit NAACP membership lists on the ground that they inhibited freedom of association.

147. 416 U.S. 20 (1974). See also *Doe v. McMillan*, 412 U.S. 306 (1973), in which parents of public school children sued to compel deletion of their children's names from a congressional report on school discipline problems. The Court held the publication was not privileged under the speech or debate clause or the official immunity doctrine and remanded for a determination of the merits of the parents' claims of invasion of privacy. *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 221 (1973).

148. 12 U.S.C. §§ 1730d, 1829b, 1951-1959 (1970); 31 U.S.C. §§ 1051-1062, 1081-1083, 1101-1105, 1121-1122 (1970).

149. 31 C.F.R. § 103.22 (1977).

and that the issue was not ripe as to the depositors since they had not alleged that they had engaged in any transaction that would trigger the reporting process.¹⁵⁰

Justice Powell's concurrence indicated his discomfort with the majority's holding. He noted that if the Treasury were to expand its regulations to the full extent of reporting permitted by the Act, substantial constitutional questions would be raised. As Justice Powell wrote:

Financial transactions can reveal much about a person's activities, associations and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to the information without invocation of the judicial process.¹⁵¹

In separate dissents, both Justices Douglas and Marshall went further, concluding that the instant reporting procedures violated the fourth amendment. For Douglas, "[o]ne's bank accounts are within the 'expectations of privacy' category. For they mirror not only one's finances but his interests, his debts, his way of life, his family, and his civic commitments." ¹⁵²

Although the majority did not purport to determine the depositors' rights on the merits, it may have been influenced in favor of the government by the fact that the reports to the Treasury were required to be kept confidential and could be shared only with other federal agencies having a legitimate interest in their contents.¹⁵³ Neither Powell nor the dissenters, however, appeared to consider the feature of confidentiality of much importance, a rather surprising fact in light of the later developments discussed below.

In a series of more recent cases the Court has dealt with governmental information systems on the merits and has consistently upheld them. In the first of these cases, *Buckley v. Valeo*,¹⁵⁴ Senator James Buckley and a variety of other plaintiffs challenged the constitutionality of the Federal Election Campaign Act of 1971 as amended in 1974.¹⁵⁵ Of present

150. 416 U.S. at 66-69, 72-75.

151. *Id.* at 78-79.

152. *Id.* at 89.

153. *Id.* at 40 n.17.

154. 424 U.S. 1 (1976).

155. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified in scattered sections of 2, 18, 47 U.S.C.), as amended by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1975) (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.).

interest is the plaintiffs' attack on the Act's reporting and disclosure provisions, which required each candidate and political committee in a presidential or congressional election to report to the Federal Elections Commission the names and addresses of all persons contributing more than ten dollars. Persons contributing \$100 or more, other than to candidates or political committees, were required to file direct statements with the Commission, which was authorized by the Act to publish the names of those contributing more than \$100, whether to candidates, committees, or otherwise. The Court rejected the plaintiffs' attacks, which were based on the first, fourth, fifth, and ninth amendments. It seemed most troubled by the first amendment argument and conceded that the reporting and publication of campaign contributions were likely to have some inhibiting effect on freedom of association by deterring prospective contributors, particularly those solicited by minor or unpopular parties.¹⁵⁶ In view of this potential first amendment infringement, the competing governmental interest in disclosure was required, at least ostensibly, to "survive exacting scrutiny."¹⁵⁷ The Court identified two such interests: informing the electorate of the sources of each candidate's financing and thus of his probable loyalties and views; and minimizing violations of campaign financing laws, both by deterring potential corruption and by exposing that which actually occurred.¹⁵⁸ In what seems to have been simply a "weighing" operation, the Court concluded that the governmental interests were sufficiently substantial and upheld the Act.¹⁵⁹

The fact that major contributors' names would be publicized by the Commission is highly significant to the decision in *Buckley*, but it cuts both ways. Although publicity tends to deter free association, it also serves to inform the public of a politically relevant matter—the candidate's source of funds—and in that sense advances first amendment interests. The opinion implies that the Court would have had even less trouble upholding the Act if the reports had been made confidential, as was the case for contributions between \$10 and \$100.¹⁶⁰ In this range, the governmental interest in exposing corruption would presumably remain, while the inhibitory effect of publicity would vanish; the Act would be valid a fortiori.

156. 424 U.S. at 71.

157. *Id.* at 64.

158. *Id.* at 66-68.

159. *Id.* at 72. The Court left open the possibility that a minor party could qualify for exemption from the Act by making a factual showing of "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties" but saw no such evidence in the present case. *Id.* at 74.

160. The Act was silent with respect to publication of contributions between \$10 and \$100 and was construed by the Court as authorizing public disclosure only about the \$100 level. *Id.* at 83-84.

It is unfortunate that the Court's analysis of the interests of the political contributors was so narrow. It concentrated on the first amendment associational right and ignored the other aspects of the contributor's interest in controlling access to information about himself: individuality, avoidance of embarrassment, and freedom of expression.¹⁶¹ Arguably, even if the interest in free association is fully protected by the assurance that the government will hold confidential the information it collects, these other interests are not protected.¹⁶² Nonetheless, the case seems to provide a rather clear answer on the merits to the generic question raised in *California Bankers*. That answer favors governmental data collection, as well as publication, although the political campaign context of the case cautions against too broad a reading on the latter point.

Two more recent cases seem to solidify this expansive view of the validity of governmental information systems, although both involve systems to which public access was prohibited. In *Planned Parenthood v. Danforth*,¹⁶³ the Court upheld a state statute requiring physicians and health facilities that perform abortions to maintain certain records of the procedures for seven years and to make them available to local, state, or national public health officers. The records were otherwise confidential. The Court seemed to concede that the recordkeeping might act as a slight inhibition on some women who wished to exercise their constitutional right to obtain abortions, but concluded that the state's interest in protecting public health and in accruing information regarding trends in medical procedures and the like was sufficiently strong to be sustained.¹⁶⁴ As in *Buckley*, the judicial process apparently involved weighing the competing interests. No "compelling interest" or "strict scrutiny" test was mentioned, and the Court's analysis of the statute's intrusion on the patient's "control of personal information" was even weaker than in *Buckley*.¹⁶⁵

Finally, in *Whalen v. Roe*,¹⁶⁶ the Court dealt with a New York statute requiring physicians to submit reports to a state computer bank on prescriptions they wrote for certain types of drugs. The program's purpose was to identify illegal drug acquisitions by addicts and illegal behavior by physicians and pharmacists as suppliers of drugs. The principal countervailing concern noted by the Court was that the reporting procedure

161. See text accompanying notes 122-24 *supra*.

162. One may feel *less* embarrassed, indignant, or intruded upon if only the Commission knows of his contributions than if the whole world knows. But even the Commission's fact-gathering may evoke these emotions to some degree.

163. 428 U.S. 52 (1976).

164. *Id.* at 80-81.

165. *Id.*

166. 429 U.S. 589 (1977).

might deter some patients from seeking needed medication, an eventuality the Court thought improbable. Emphasizing the extensive security precautions taken to preclude public access to the data base in the state's computer, the Court held the system valid. Still, the Court seemed less than fully sanguine about its conclusion, and its final paragraph may be read as a warning that *some* state-sponsored information systems may yet be found not to pass constitutional muster:

We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces and the enforcement of the criminal laws, all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data—whether intentional or unintentional—or by a system that did not contain comparable security provisions. We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.¹⁶⁷

All members of the Court joined in the opinion, which was written by Justice Stevens. Justice Brennan concurred to express his view that, absent the existing safeguards against public access, the New York scheme “would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests.”¹⁶⁸ Neither Justices Powell nor Marshall re-expressed the concerns they had articulated separately three years earlier in *California Bankers*. Quite possibly they regarded information with respect to an individual's medications as more innocuous and hence less intrusive than his bank transactions. Thus the Court seems to have set the stage for a continuing balancing process, in which the government's need for information and the

167. *Id.* at 605-06.

168. *Id.* at 606.

individual's desire to control personal information are both seen as legitimate, though conflicting.¹⁶⁹

The analytic framework for future constitutional decisions involving governmental data systems is likely to be quite similar to that that the courts are developing in tort cases of public disclosure of private facts.¹⁷⁰ Some differences, however, are apparent. If an information system incorporates adequate provisions for confidentiality, it thereby eliminates both the free press first amendment argument (which would tend to support the validity of the system) and much of the intrusiveness (which would tend to negate its validity). Obviously the weight to be attached to both the free press and control-of-personal-information arguments will vary with the specific type of information involved. For example, neither *California Bankers*, *Planned Parenthood*, nor *Whalen* make any reference to the free press argument, presumably because the statutes in question prohibited press access and because information about a private person's bank transactions, abortion, or medication are not normally newsworthy or of public interest. But even if public disclosure is forbidden, the intrusive quality of the process of information collection and maintenance must still be weighed against the government's need for the information. In addition, more limiting state constitutional decisions are possible, although they have not yet been forthcoming.¹⁷¹

169. One recent case that seems irreconcilable with *Whalen* and its predecessors is *Paul v. Davis*, 424 U.S. 693 (1976), noted in 90 HARV. L. REV. 86 (1976), in which five members of the Court upheld the Louisville, Kentucky police department's action in circulating a flyer identifying the plaintiff as an active shoplifter despite the fact that he had never been convicted of such a charge. Justice Rehnquist's opinion for the Court seems to recognize only two types of constitutional privacy claims: those based on unreasonably intrusive searches, and those involving state regulation of intimate personal activities and decisions. Control-of-personal-information privacy is ignored. The decision is inconsistent with the cases discussed in the text and may be an aberration.

170. See text accompanying note 75 *supra*.

171. The state court decisions have generally upheld state information systems. See, e.g., *Volhmen v. Miller*, 52 App. Div. 2d 146, 383 N.Y.S.2d 95 (1976) (computer bank data on all mental health patients of state clinics held valid); *Matter of Schulman v. New York City Health & Hosp. Corp.*, 38 N.Y.2d 234, 379 N.Y.S.2d 702, 342 N.E.2d 501 (1975) (state computer bank for data on all abortions held valid); *Industrial Foundation v. Texas Indus. Acc. Bd.*, 540 S.W.2d 668 (Tex. 1976) (files of workmen's compensation claims not protected from disclosure per se; case remanded for ad hoc determination as to which files contained information too personal to reveal). See also *Fifth Ave. Peace Parade Comm. v. Gray*, 480 F.2d 326 (2d Cir. 1973) (FBI examination of bank account of war protest group held valid); *Association of Am. Physicians and Surgeons v. Weinberger*, 395 F. Supp. 125 (M.D. Ill. 1975) (Professional Standards Review Law requiring reports by physician regarding their cases held valid).

The few states that have adopted explicit constitutional provisions dealing with the right of privacy may be willing to go further in protecting such interests than the Supreme Court. See, e.g., *Ravin v. State*, 537 P.2d 494 (Alas. 1975) (prohibition of marijuana use in one's home unconstitutional); *White v. Davis*, 13 Cal. 3d 757, 120 Cal. Rptr. 94, 533 P.2d 222 (1975) (undercover police surveillance of university classes unconstitutional). Again, no cases with real estate information have been found.

The implications of these decisions for secrecy in real estate are not easy to divine. With respect to ownership information, which has traditionally been a matter of public record in the United States, it is doubtful that any constitutional barrier exists to widespread governmental data collection and disclosure. Information about condition and quality of realty is another matter. One might argue that if sufficiently detailed, it would reveal too much about the owner or occupant's activities, associations, and beliefs, to paraphrase Justice Powell's concurrence in *California Bankers*.¹⁷² No generalization seems possible, however. Decisions adjudicating the constitutionality of governmental systems that collect such information are likely to turn on the nature of the data sought, the strength of the public objectives to be served, and the extent of confidentiality or publicity given the information assembled.

E. Statutory Controls on Government Disclosures

In addition to the constitutional inhibitions on governmental information systems, both federal and state statutes may either limit or mandate governmental action to disclose publicly certain information about real property which it possesses. Such legislation, however, is typically applicable only to the disclosure phase of an information system's operation and has no bearing on the processes of information collection, assembly, and storage so long as public divulgence is not involved.

At the federal level, two statutes are of importance: The Freedom of Information Act¹⁷³ and the Privacy Act of 1974.¹⁷⁴ The basic thrust of the FOIA is to grant public access to information possessed by the government, but it contains a number of exemptions¹⁷⁵ under which an agency can refuse to deliver the requested material.¹⁷⁶ Several of these exemptions might occasionally cover information regarding ownership or qualities of real estate.

Exemption 4 specifically excludes "trade secrets and commercial or financial information obtained from a person and privileged or confidential."¹⁷⁷ Exemption 9 excludes "geological and geophysical informa-

172. See text accompanying note 150 *supra*.

173. 5 U.S.C. § 552 (1976).

174. *Id.* § 552a.

175. *Id.* § 552(b).

176. The Act specifically limits nondisclosure to the exemptions listed in 5 U.S.C. § 552(b). *Id.* § 552(c). The courts have consistently read these exemptions narrowly to maximize government disclosure. *Department of the Air Force v. Rose*, 424 U.S. 352 (1976); *Vaughn v. Rosen*, 484 F.2d 820 (1973), *cert. denied*, 415 U.S. 977 (1974); *Ethyl Corp. v. EPA*, 478 F.2d 47 (1973).

177. 5 U.S.C. § 552(b)(4) (1976).

tion and data, including maps, concerning wells.”¹⁷⁸ The legislative history of the FOIA reveals that exemption 9 was prompted by energy industry fears that confidential information provided to the government by oil and gas producers would not fall under the ambit of exemption 4, trade secrets.¹⁷⁹

In *Continental Oil Co. v. FPC*,¹⁸⁰ however, those fears were somewhat allayed. The court there held that although the FPC might compel disclosure of intrastate sales activities by natural gas companies, such information was privileged from disclosure within the meaning of exemption 4.¹⁸¹ The court reasoned that although such information was not specifically a trade secret, it was nonetheless (a) commercial or financial, (b) obtained from a person, and (c) privileged and confidential.¹⁸² The privilege against disclosure thus arose not out of any privacy interest inherent in the ownership or interest in real property, but rather out of the commercial and competitive value of such information.

A similar result was reached in *Pennzoil Co. v. FPC*,¹⁸³ in which the agency ordered a number of natural gas companies to file detailed reports on their holdings of gas reserves, and proposed to make them public. The companies resisted the order on the ground that the reports fell under FOIA exemptions 4 (trade secrets) and 9 (geological information concerning wells). The agency did not dispute that the exemptions were applicable.¹⁸⁴ Nonetheless, the court concluded that the agency might still disclose the information upon a finding that the public interest “outweighed” the privacy interest in nondisclosure.¹⁸⁵ Thus, the privilege against disclosure found under exemptions 4 and 9 is not absolute. Rather, it is conditioned upon a balancing of the competitive interest in confidentiality and the public interest.

Exemption (b)(6) may also, in certain circumstances, apply to privacy interests incident to real property ownership. It excludes from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”¹⁸⁶ To the extent that governmental files “similar” to personnel

178. *Id.* § 552(b)(9).

179. H.R. REP. NO. 1497, 89th Cong., 2d Sess. 11, reprinted in [1966] U.S. CODE CONG. & AD. NEWS 2418, 2428.

180. 519 F.2d 31 (5th Cir. 1975).

181. *Id.* at 35.

182. *Id.*

183. 534 F.2d 627 (5th Cir. 1976).

184. *Id.* at 630 n.2.

185. *Id.*

186. 5 U.S.C. § 552(b)(6) (1976).

or medical files contain information on interests in real property, that information may be protected from disclosure.

The terms of the exemption are obviously broad and are not self-defining. The mechanism by which a court is expected to distinguish between exempt and nonexempt files is scarcely clear and has been the subject of wide critical dispute.¹⁸⁷ Some guidance, however, is provided by the Supreme Court's recent decision in *Department of the Air Force v. Rose*.¹⁸⁸ Law review students at New York University, preparing a study of the constitutionality of disciplinary proceedings in military academies, requested copies of the summaries prepared by the Air Force Academy of student honor and ethics hearings. The summaries were readily available to the Department and fairly widely disseminated within the Academy itself,¹⁸⁹ and the requesters stipulated that the summaries should be delivered with names and other personally identifying matter deleted. Upon the agency's refusal, the requesters filed a suit under the FOIA.

In upholding the plaintiffs' claim, the Court analyzed, *inter alia*, the agency's defense under the privacy language of exemption 6. It held that the requested summaries were indeed files "similar" to medical and personnel records since, if disclosed, they raised the risk that the disciplined cadets could be exposed "to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends."¹⁹⁰ Moreover, "similar files" were intended to be treated by the courts under precisely the same standards as "medical and personnel files." Yet the Court found a strong expression of congressional policy favoring disclosure in the statute's statement that the exemption would apply only if disclosure was "clearly unwarranted." In light of the proposed procedure under which the district court would review each summary and eliminate personal references to the cadets, the Court concluded that disclosure was not "clearly unwarranted," and held for the plaintiffs. In so doing, the Court was explicitly influenced by the fact that the summaries were not held highly confidential within the Academy. Thus, it weighed the rather slight potential personal harm that might accrue to affected cadets from

187. Note, *Freedom of Information Act—The Parameters of the Exemptions*, 62 GEO. L.J. 177 (1973); Note, *Invasion of Privacy and the Freedom of Information Act: Getman v. NLRB*, 40 GEO. WASH. L. REV. 527 (1972); Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 HARV. C.R.-C.L.L. REV. 596 (1976); Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1078-85 (1975).

188. 425 U.S. 352 (1976).

189. They were customarily posted on 40 squadron bulletin boards and distributed to faculty and administration officials. *Id.* at 355.

190. *Id.* at 376-77.

disclosure against the strong congressional intent to open public business to the public view and found the former interest insufficient. In favoring disclosure, the Court did not explicitly weigh the social utility or value of the use the plaintiffs proposed to make of the information. Whether doing so is appropriate is a matter of controversy that *Rose* does not clearly resolve.¹⁹¹

There is, of course, an uncomfortable lack of precision in this decision. Reasonable minds can differ about the extent of the risk that individual cadets might be stigmatized as a result of disclosure; both Justice Blackmun's and Chief Justice Burger's dissents concluded that this risk far outweighed the interest of the plaintiffs in disclosure.¹⁹² Yet the process of weighing the intrusiveness of the information is rather clearly called for by the statute, and the Court cannot be faulted for undertaking it.

At least two cases involving exemption 6 concern information about real property. The most intriguing is *Robles v. EPA*,¹⁹³ in which the plaintiffs sought release of an EPA survey of the levels of radioactivity in some 15,000 private and public buildings in Grand Junction, Colorado, which had been built on fill composed in part of tailings from a uranium processing plant. The EPA resisted disclosure, arguing that such information was "similar" to medical and personnel files and hence exempt since it had a bearing on the personal health of the occupants of the buildings. The court conceded the existence of some relevance to health, but nevertheless ordered disclosure on the ground that it was not "clearly unwarranted" by privacy considerations. The court treated as irrelevant the merits of the plaintiffs' proposed use of the data.¹⁹⁴ Following much the same path as the Supreme Court in *Rose*, it noted that the information was already in the hands of the Colorado Department of Health, which had followed without objection a policy of disclosing such information on specific property to anyone requesting it. Thus, the further invasion of privacy that would result from the requested disclosure seemed minor.

191. Compare Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 HARV. C.R.-C.L.L. REV. 596, 611-18 (1976) with K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.4 (Supp. 1970) and Note, *Invasion of Privacy and the Freedom of Information Act*, 40 GEO. WASH. L. REV. 527 (1972).

Chief Justice Burger's dissent indicates that he considered the utility of the plaintiff's proposed use of the material and found it wanting. He stated, "It is indeed difficult to attribute to Congress a willingness to subject an individual citizen to the risk of possible severe damage to his reputation simply to permit law students to invade individual privacy to prepare a law journal article." 425 U.S. at 384.

192. 425 U.S. at 382.

193. 484 F.2d 843 (4th Cir. 1973).

194. See sources cited note 180 *supra*.

Material of considerably greater sensitivity was sought in *Rural Housing Alliance v. United States Department of Agriculture*.¹⁹⁵ The agency had prepared a study of possible racial discrimination in its rural housing program in two Florida counties. Much of the material was collected in the form of "case studies" that were derived from in-depth interviews with rural families and included information on their financial status, property ownership, medical history, pregnancies, family fights, and other intimate matters. The court had no difficulty concluding that these reports were "similar" to medical and personnel files. It remanded the case to the district court for a determination as to whether enough identifying material could be deleted from the files to avoid a "clearly unwarranted invasion of personal privacy." It is doubtful that the court would have been so troubled by the disclosure if only matters relating to real property had been included in the files.

In these cases the courts clearly demonstrate a bias in favor of disclosure when the government's defense is based on the invasion of privacy. They are quite willing to engage in ad hoc weighing of the privacy interest and to review the material in as much detail as is needed to delete particularly intimate or identifying items. This sort of review and reduction would probably be unnecessary in most cases exclusively involving real estate information, for its disclosure would rarely approach the "clearly unwarranted" standard.

FOIA exemption under 4, 6, or 9 is therefore not absolute—even when the material sought clearly falls within an exemption, agencies and courts must engage in a balancing of the respective interests to ascertain whether disclosure is warranted.¹⁹⁶ In one category of cases, however, the problem of balancing is further compounded by the interaction of the FOIA and the Privacy Act of 1974.¹⁹⁷ The Privacy Act broadly prohibits release by federal agencies of any "item, collection, or grouping of information about an individual"¹⁹⁸ if the file is retrieved by the use of the subject's name or other identifying number or symbol. The Privacy Act contains a specific exemption for material that agencies must release under the FOIA.¹⁹⁹ Thus, on its face it does not change the law with

195. 498 F.2d 73 (D.C. Cir. 1974).

196. See *Pennzoil Co. v. FPC*, 534 F.2d 627 (5th Cir. 1976), discussed in text accompanying notes 183-85 *supra*; see also Comment, *Protection from Government Disclosure—The Reverse FOIA Suit*, 1976 DUKE L.J. 330.

197. 5 U.S.C. § 552(a) (1976).

198. *Id.* § 552a(a)(4). The subject of the file may, however, give his consent to its release. *Id.* § 552a(b).

199. *Id.* § 552a(b)(2).

regard to the ability of members of the public to compel disclosure. But since the advent of the Privacy Act, an agency voluntarily or mistakenly releasing data that is exempt from the FOIA may well subject itself to civil liability if the data is sufficiently personal to fit the Privacy Act definition quoted above. A Privacy Act plaintiff may recover costs, attorney's fees, and actual damages, which could be substantial.²⁰⁰

Prior to 1974, agencies could always obviate the risk of litigation by acquiescing in the request for the information. This is no longer so. A decision either way by the agency can give rise to a suit, and the risk of disclosure may seem greater than the risk of withholding, since a Privacy Act judgment can include damages. The probable result is that agencies will be increasingly reluctant to release files that are related to specific individuals, however innocuous the personal references in them may be.²⁰¹ Information regarding real estate will quite commonly be related in the file to the name of its owner and, in such cases, would appear to be covered by the Privacy Act. The agency asked to release such data could presumably do so safely only by expurgating names and other identifying data in every case. In situations like that in *Robles v. EPA*,²⁰² for example, the agency would probably be even more resistant to disclosure after the advent of the Privacy Act than before.

A large majority of the states have enacted legislation similar to the FOIA,²⁰³ and at least two have passed statutes comparable to the Privacy Act as well.²⁰⁴ Even prior to this legislative activity, much of which has been quite recent, a fairly well-recognized common law right to access to public records existed,²⁰⁵ but the cases were sparse and often defined

200. *Id.* § 552a(g)(4). Under the 1974 FOIA amendments, an FOIA plaintiff may also be awarded costs and attorney's fees, but not damages. *Id.* § 552(a)(4)(E).

201. See Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 HARV. C.R.-C.L.L. REV. 597, 627-31 (1976).

202. See note 193 & accompanying text *supra*.

203. See Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1163 n.1169 (1975) (listing 43 statutes) [hereinafter cited as MICH. PROJECT].

204. MINN. STAT. ANN. §§ 15.162-.168 (West Supp. 1975); UTAH CODE ANN. §§ 63-50-1 to -10 (Supp. 1975); see MICH. PROJECT, *supra* note 203, at 1266-69; Comment, *Informational Privacy and Public Records*, 8 PAC. L.J. 25 (1977) (discussing the vetoed California Information Practices Act). These statutes should not be confused with recent enactments in a few states, sometimes termed "privacy acts," which merely codify or vary the existing tort of invasion of privacy. See, e.g., Note, *The Massachusetts Right of Privacy Statute: Decoy or Ugly Duckling?*, 9 SUFFOLK L. REV. 1248 (1975). Numerous state statutes also protect individual privacy with respect to specific types of public records, such as adoption, arrest, parole, motor vehicles, education, taxation, and welfare. See MICH. PROJECT, *supra* note 203, at 1242-77.

205. H. CROSS, *THE PEOPLE'S RIGHT TO KNOW* 55-56 (1953); MICH. PROJECT, *supra* note 203, at 1163-67.

"public records" narrowly to include only records required by law to be kept.²⁰⁶ Even in states with FOIA-type legislation, the common law right to access may still exist and may offer an alternative theory for a plaintiff.²⁰⁷ The statutory provisions vary from state to state, and generalization is difficult. They typically contain lists of exemptions similar to those in the FOIA; an exemption relating to invasions of personal privacy is common.²⁰⁸ Several state acts, unlike the FOIA, include a "residual" exemption, permitting a court to withhold access in any case in which the public interest in keeping the material confidential clearly exceeds the public interest in its disclosure.²⁰⁹ This sort of language seems to authorize consideration by the court of the plaintiff's proposed use of the information, a matter that is still unsettled under federal law.²¹⁰ Both the privacy and residual exemptions found in state statutes necessitate a weighing of the seriousness of invasion of privacy that may result from disclosure of personal data, and the decisions thus far follow the same general pattern as the federal cases already discussed.²¹¹ No state cases involving information regarding real property have been found, however.

III. COMPELLING DISCLOSURE BY LAND OWNERS

The foregoing discussion has dealt with the potential liability to the landowner of persons, whether in a private or governmental capacity,

206. See, e.g., *Amos v. Gunn*, 84 Fla. 285, 94 So. 615 (1922); cf. *International Union, UAW v. Gooding*, 251 Wis. 362, 29 N.W.2d 730 (1947) ("public records" defined as all papers required to be kept and all writings made by public officer within his authority and in discharge of his official duties). Even under a few modern statutes the same narrow definition of public records prevails. See MICH. PROJECT, *supra* note 203, at 1166-67.

207. The New York statute, for example, expressly preserves pre-existing common law rights. N.Y. PUB. OFF. LAW § 88.10 (McKinney Supp. 1974).

208. The wording of the privacy exemption varies widely; some use the FOIA phrase "clearly unwarranted." See MICH. PROJECT, *supra* note 203, at 1172-73 nn.1218, 1219.

209. See *Black Panther Party v. Kehoe*, 39 Cal. App. 3d 900, 907, 114 Cal. Rptr. 725, 729 (1974); *Yarish v. Nelson*, 27 Cal. App. 3d 893, 902, 104 Cal. Rptr. 205, 212 (1972); MICH. PROJECT, *supra* note 203, at 1174 n.1225.

210. See note 191 & accompanying text *supra*.

211. In *Industrial Foundation v. Texas Indus. Acc. Bd.*, 540 S.W.2d 668 (Tex. 1976), the Foundation sought access under the Texas Open Records Act to workmen's compensation claims files held by the Board. Unlike the FOIA, the Act contained no explicit privacy exemption, but it did exempt information deemed confidential by constitutional law. In a careful opinion, the court held that the files sought were not generally of such a personal or intimate nature as to be confidential under the U.S. Constitution. It refused to consider the purpose to which the Foundation intended to put the files (which allegedly was to assist its employer members in screening out job applicants who had previously filed claims) and granted disclosure, subject to in camera review and redaction by the trial court of any particular files that the Board found to contain highly personal or embarrassing information.

who obtain information about the owner's title or the qualities of his land and reveal it to others. We turn now to a more direct approach: under what circumstances does the law compel the owner himself to inform others concerning his land? It seems clear that the federal, and possible state, constitutional limitations analyzed in Part II will be equally applicable here. If government, by statute or court decision, obligates an owner to make disclosures that intrude on his constitutionally protected zone of privacy, the presence of state or federal action and the consequent triggering of the Bill of Rights or, if a state is involved, the fourteenth amendment seems obvious. Government cannot compel the owner to give up directly what it could not take from him. The content of the constitutional limitations will not be reviewed in detail in this part, but should be borne in mind.

Analysis of compelled disclosure may be subdivided along several dimensions: federal versus state governmental actions, legislative versus judicial directives to disclose, and disclosures respecting title and ownership versus those that pertain to the quality or physical characteristics of the realty. There is no vast body of law in most of these areas, for governmental action compelling disclosure has been less than vigorous for the most part. The discussion that follows will first consider title and ownership disclosures and then disclosures concerning physical attributes of land.

A. Disclosing Ownership

As already noted,²¹² nearly everyone who owns any interest in land places in the public records *some* document evidencing that interest. Failure to do so raises the risk, under American recording statutes, that subsequent purchasers or creditors of a previous owner may deprive the present claimant of his title. But it is equally true that the recorded document, in order to provide the protection the present owner desires, need not disclose his name or identify him in any way. Instead, a trustee, nominee, corporation, or other "artificial" entity may be interposed as legal title-holder. Its relationship with the beneficial owner may then be represented by an off-the-record agreement that the intermediary may decline to disclose in detail to anyone else. In this fashion the beneficial owner's identity can readily be concealed from the world.

Such a procedure is valid nearly everywhere in the United States. Indeed, one who proposes to write a rule to pierce this veil and make the

212. See text accompanying note 7 *supra*.

beneficial owner's identity public is immediately struck by the complexity of the task. It is obviously not enough simply to say that every trustee, for example, must report or set forth in each recorded conveyance the names of the beneficiaries of his trust. It is all too common for the beneficiaries themselves to be artificial entities—other trusts, corporations, or the like—with several levels of such entities possible before one reaches the natural persons who benefit from the ownership.²¹³ In addition, the draftsman must consider whether his real concern is with control of the land's use or with receipt of its economic benefits, for the two attributes may readily be allocated to different natural persons in a trust. The possibility of shareholder voting agreements, long-term leases, the issuance of debt with conversion privileges or other equity-like characteristics, and installment sale contracts must also be considered, for each of these tools has the capacity to disguise what amounts to a transfer of some degree of beneficial interest. Finally, the draftsman must consider the problem of changes in ownership of the beneficial interests over time, even though the legal title remains static. If current information is desired, it will do little good merely to require disclosures by artificial entities at the time they acquire the land in question; the data could become obsolete overnight.

The rulemaking obstacles are formidable, and the result might well be so unwieldy that it could scarcely be justified by the supposed benefits to the public of the knowledge thus obtained. Nonetheless, three states (Illinois, Iowa and Arizona), which have adopted comprehensive statutes aimed at public disclosure of beneficial interests in real estate, have met with varying degrees of success. The three statutes vary markedly, probably because the legislatures that enacted them were concerned about three unrelated political issues. In Illinois the statutes seem to have stemmed from legislative apprehension over slum housing problems and corruption among public officials.²¹⁴ Iowa's law was a response to public concern over increasing foreign investment in farm land.²¹⁵ In Arizona, the fear that organized crime would become entrenched in the state prompted action.²¹⁶

213. Zumbach & Harl, *Anonymity and Disclosure in Ownership Reporting Systems*, in U.S. DEP'T OF AGRICULTURE, *FOREIGN INVESTMENT IN U.S. REAL ESTATE* 320 (1976), also reprinted in 8 U.S. DEP'T OF COMMERCE, *FOREIGN DIRECT INVESTMENT IN THE UNITED STATES* app. L, at L-141 (1976).

214. See Garrett, *Legal Aspects of Land Trusts*, 35 CHI. B. REC. 445 (1954); Feature, *The Illinois Land Trust—Shroud with a Silver Lining?*, 5 LOY. CHI. L.J. 412 (1974).

215. See Currie, Boehlje, Harl, & Harris, *Foreign Investment in Iowa Farmland*, and Harl, *The Iowa Reporting Law and Alien Ownership*, both reprinted in 8 U.S. DEP'T OF COMMERCE, *FOREIGN DIRECT INVESTMENT IN THE UNITED STATES* app. L, at L-29, L-164 (1976).

216. See N.Y. Times, Mar. 30, 1976, at 20, col. 4.

In Illinois the legislature has moved only tentatively to require disclosure of the identities of land trust beneficiaries. Its first enactment, in 1963, requires land trustees and managing agents to disclose to local governments the "identity of every owner and beneficiary with an interest in present use and enjoyment" within ten days after receiving a notice or complaint of violation of any ordinance "relating to conditions or operations of real property affecting health or safety."²¹⁷ The apparent intent was to force disclosure of the owners of buildings with housing code violations.²¹⁸ A penalty of \$100 per day is provided, and the statute would appear to be reasonably effective within its limited sphere, although it spells out no specific procedure to compel the required disclosure.

In 1969 the Illinois legislature added two other disclosure provisions. One applies to sales of residential buildings of six units or fewer by means of installment contracts with payments spread over more than five years. In such cases the contract is voidable at the buyer's option unless the beneficiaries of the land trust selling the property are identified in and sign the contract.²¹⁹ The coverage of this provision is obviously quite limited. Moreover, it seems defective in that it applies only to "beneficiaries" rather than to persons "with a present interest in use or enjoyment" as in the code violation statute. The latter phrase would seem to cover beneficiaries of subsidiary trusts, persons holding executory contractual rights to purchase beneficial interests, persons holding through nominees as beneficiaries,²²⁰ and the like. Neither language, however, covers corporate or other nontrust arrangements by which ownership might be concealed.

Illinois' third statute, also enacted in 1969, requires any land trustee or managing agent who enters into a contract with any governmental entity regarding the ownership or use of land to disclose in writing "the identity of every owner and beneficiary having any interest, real or personal, in

217. ILL. REV. STAT. ch. 80, § 81 (1971).

218. See Feature, *The Illinois Land Trust—Shroud with a Silver Lining?*, 5 LOY. CHI. L.J. 412, 420 (1974).

219. ILL. REV. STAT. ch. 29, § 8.31-.32 (Supp. 1977). It is interesting that the Illinois legislature took this step only with respect to vendors under long-term installment contracts. Such contracts have been a serious problem in transfers of inner-city property in the Chicago area. See *Clark v. Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974), cert. denied, 419 U.S. 1070 (1974). Yet, the purchaser's need to know is not confined to installment contracts but is equally important in other types of vendor-financed sales. It is also important, though to a lesser extent, in cash sales insofar as claims on warranties of quality or misrepresentation are actionable.

220. Cf. ILL. REV. STAT. ch. 148, § 106 (Supp. 1977) (authorizing trustees to hold trust property in the name of a nominee with no mention in the recorded document of the trust's existence).

such property.”²²¹ Again, nontrust arrangements are not covered, but presumably indirect or layered trust interests would be included. The statute enjoins the courts to construe it liberally to require “identification of the actual parties benefitting” from the transaction. Strangely, the penalty provisions apply only to public officeholders, but since the statute by its terms imposes the duty to disclose solely on the trustee, it is not clear how any public official *could* be in violation unless he were also the trustee—an improbable situation. Another weakness of the statute is its failure to cover noncontractual dealings with land by local government officials, such as rezonings, assessment liens, and other decisions that can substantially affect land value.²²²

Numerous bills have been introduced recently in the Illinois legislature to expand the disclosure duties of land trustees.²²³ They have varied widely in scope, but none have been enacted. Since most of these bills would have left the nonsecrecy advantages of land trusts, such as ease of transfer, unimpaired, it is apparent that secrecy itself is seen by the legislators as attractive and worthy of preservation. Legislation, however, is not the only way the veil of secrecy might be pierced; conceivably courts could require disclosure as well. The Illinois courts have shown no interest in holding secrecy to violate public policy.²²⁴ If, however, litigation arose in which the identity of the beneficiaries of a land trust were relevant, the ordinary processes of civil discovery would presumably be available to uncover them, with support from a judicial order if necessary.²²⁵ Still, this approach is costly, requires filing a complaint, and may not be appropriate in many circumstances. Illinois thus remains without any comprehensive law mandating disclosure of beneficial ownership.

Iowa’s legislative concerns, and its disclosure requirements, differ radically from those of Illinois. The state has a long history of statutory hostility to land ownership by nonresident aliens.²²⁶ Under Iowa law, a

221. *Id.* ch. 102, §§ 3.1, 4 (Supp. 1977).

222. *But see* United States v. Keane, 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976) (city councilman who acquired tax delinquent parcels through land trust and obtained city action discharging assessment liens, found guilty of mail fraud).

223. *See* Elliott, *The Proposed Land Trust Act*, 63 ILL. B.J. 254 (1975); Note, *Land Trust Secrecy—Perhaps a Secret No More*, 23 DEPAUL L. REV. 509, 512-16 (1973).

224. *See, e.g.*, Chicago Fed. Sav. & Loan Ass’n v. Cacciatore, 25 Ill. 2d 535, 185 N.E.2d 670 (1962).

225. *See* ILL. REV. STAT. ch. 110A, § 201 (1968 & Supp. 1977).

226. *See* Note, *Property Rights of Aliens Under Iowa and Federal Law*, 47 IOWA L. REV. 105 (1961). Restrictions on land ownership by nonresident aliens are not uncommon among American states. *See* sources cited note 228 *infra*.

nonresident alien may not own more than 640 acres located outside the corporate limits of a town or city.²²⁷ Both foreign corporations and United States corporations, half of whose stock is controlled by nonresident aliens, are similarly restricted. These provisions are open to constitutional attack, but the outcome of such litigation is uncertain.²²⁸

Presumably as a means of enforcing these restrictions on alien ownership, and as a way of quantifying the extent of land acquisition by nonresident aliens, the Iowa legislature in 1975 added a reporting provision that requires every nonresident alien who owns or leases agricultural land or engages in farming outside the corporate limits of any city in Iowa to file an annual report identifying the owner of the land, the type of agriculture, the size and location of the land, the types and amounts of livestock and crops, and the amount of land leased.²²⁹ Finally, the statute provides, "The nonresident shall also disclose whether such nonresident alien is represented in Iowa by an agent or other representative and, if so represented, the name of the individual or firm acting in such capacity."²³⁰ The substantive prohibition on nonresident alien ownership in Iowa speaks of "acquiring title to or holding" real estate.²³¹ It is unclear whether indirect ownership, as through a nominee or a land trust, is prohibited, and there seem to be no judicial decisions on the point. The language of the reporting statute, "owning or leasing," is equally ambiguous. If such indirect ownership is covered, then the reporting statute quoted above may well compel disclosure of the trust or nominee relationship, since it may constitute "represent[ation] . . . by an agent." Arguably this aspect of the statute will pierce any number of layers of trusts, contracts, or the like to expose the individual nonresident alien. But whether this is the real intent of the statute is admittedly speculative.

Assuming that the statute will operate to disclose beneficial interests in this manner, it is instructive to compare it with the Illinois legislation. Reporting of such interests in Illinois is keyed to specific events: a code violation complaint, an installment contract sale, or a contract with a local governmental body.²³² By contrast, the Iowa statute requires annual reporting to the secretary of state whether or not any event of in-

227. IOWA CODE ANN. § 567.1 (West Supp. 1977).

228. See generally Lowe, *The Arizona Alien Land Law: Its Meaning and Constitutional Validity*, 1976 ARIZ. ST. L. REV. 253 (1976); Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621 (1976); Note *Foreign Direct Investment in United States Real Estate: Xenophobic or Principled Reaction?* 28 U. FLA. L. REV. 491 (1976).

229. IOWA CODE ANN. § 567.9 (West Supp. 1977).

230. *Id.* § 567.9(5).

231. *Id.* § 567.1.

232. See notes 217-22 & accompanying text *supra*.

terest has occurred since the previous report. Of course, the Iowa statute has a very limited scope, since the amount of land in the state owned by nonresident aliens is probably miniscule.²³³ The Iowa provision overcomes one important defect of the Illinois law by providing a specific form and procedure for reporting, but it is weaker than Illinois law in another respect; it mentions no penalty whatever for noncompliance.

In Arizona, concern has grown in recent years over the increasing economic power of organized crime, particularly in the fields of land ownership and development.²³⁴ It has been widely believed that one way to circumvent this trend was to "outlaw secret trusts"—that is, to require disclosure of beneficiaries.²³⁵ To accomplish this, the Arizona legislature enacted, as an amendment to the recording statute, a broad provision requiring that in every conveyance to or from a trustee or other person acting in a representative capacity, language must be included giving the names and addresses of the beneficiaries or persons represented and identifying the trust or other agreement or referring to the book and page in the public records at which it appears.²³⁶ For trusts and other arrangements already in existence on the statute's effective date, the trustee or other representative was given 120 days within which to record an affidavit giving the same information.²³⁷

In one respect—the types of arrangements covered—the Arizona statute is certainly more comprehensive than those of Iowa or Illinois. It is difficult to imagine any type of nominee or representative relationship that is not included. Even so, the status of the "shell corporation" as a land-holding device seems not to be covered. Perhaps the Arizona courts will distinguish between corporations that are passive real estate owners and those that engage in some active business, but the statute provides no guidance on this point. In other respects, the new law is even more confusing. What does it mean to "identify" a trust? Is it sufficient to give a trust number, or must the text of the trust agreement appear? Is it required that natural persons be the listed beneficiaries, or may the name of

233. A 1975 survey to which 511 real estate brokers in Iowa responded indicated that only 65 had even heard of a transaction or inquiry involving a foreign investor. Many of these were duplicates, and the investigators were able to document only 10 transactions. Currie, Boehlje, Harl, & Harris, *Foreign Investment in Iowa Farmland*, reprinted in 8 U.S. DEP'T OF COMMERCE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, app. L. at L-29 (1976).

234. The murder of investigative reporter Don Bolles while working on a story on this subject moved the matter to national attention. See, e.g., *Trial is Ordered for Dog Owner in Bombing Murder of Reporter*, N.Y. Times, June 23, 1976, at 12, col. 1.

235. See *Millions in Arizona Land Frauds Alleged*, *id.*, Mar. 30, 1975, § 1, at 20, col. 4.

236. ARIZ. REV. STAT. § 33-401(C) (Supp. 1977).

237. *Id.* § 33-401(D)-(E).

another trustee, a corporation, or a nominee be given as the beneficiary of the trust in question? None of these matters is clearly addressed.

The Arizona statute, like that of Illinois, is "event-based," but here the event that triggers disclosure is the transfer of land to or from the representative. Apparently occurrences after the conveyance of legal title, such as changes in beneficiaries or modifications in the terms of the trust agreement, need not be disclosed, though this seems an obvious technique for evasion of the law's objective.

The statute's penalties for noncompliance are strange as well. For failure of existing representatives to file affidavits within 120 days of the effective date, severe criminal penalties are provided.²³⁸ Nevertheless, for future transfers that fail to include the necessary disclosures, the only sanction is that the transfer "shall be voidable." The meaning of "voidable" in this context is uncertain. One possibility is that the transaction may be rescinded at the option of the innocent party—the one not acting in a representative capacity. This may make some sense in the case of a transfer *to* a representative, but it is obviously meaningless in most cases of transfers *from* representatives since the transferee will usually have no desire to avoid the transaction. In either circumstance, the sanction seems highly arbitrary and uncertain. An alternative reading of "voidable," and one that seems slightly more consistent with the placement of the statute in the article on recording, is that the noncomplying conveyance is treated as giving no constructive notice for purposes of the recording act. Hence, the grantor may reconvey the same property to another grantee free of any effect from the prior conveyance; in effect, the document is deemed unrecorded. Again, this view makes sense only when the guilty representative is the *grantee*; if he is the grantor, giving him the power to deprive his original, and presumably innocent, grantee of title by a second deed is a strange way to punish him for neglecting to make the required disclosures.

Despite its apparent comprehensiveness, the Arizona statute is a drafting bungle. It lends weight to the conclusion that no jurisdiction in the United States has come to grips with the issue of mandatory disclosure of beneficial ownership of land. The task is certainly not a simple one and should not be undertaken without sensitivity both to the costs that any type of reporting system will entail²³⁹ and to the manifold methods of evasion that ingenious counsel may invent to protect the secrecy of their

238. *Id.* § 33-401(F).

239. See Zumbach & Harl, *supra* note 213 at 321. The authors also analyze the potential for a federal disclosure requirement. *Id.* at 329-31.

clients. It is clear, however, that the issue deserves a much better effort than any legislature has given thus far.

B. Financial Disclosure Laws for Public Officials

Concern about conflicts of interest among public officials, mentioned above in connection with the Illinois land trust statutes,²⁴⁰ has surfaced in recent years in a much broader fashion. By 1975 some sixteen states had adopted legislation requiring disclosure by public officials of various types of financial data,²⁴¹ and in several other states a similar result has been accomplished by executive order.²⁴² These disclosure rules vary in coverage, and many include interests in real property.²⁴³ Again it is often unclear whether beneficial interests in trusts, corporations, or other land-holding entities are included, but there is a substantial chance of the courts so holding.²⁴⁴

Attacks on the constitutionality of these disclosure requirements have been mounted in several cases. In *City of Carmel-by-the-Sea v. Young*,²⁴⁵ the California Supreme Court struck down the California statute, which included real estate not used for personal or recreational purposes, on grounds of invasion of privacy. The court concluded that the statute was too intrusive to be justified by its admittedly valid governmental objective.²⁴⁶ A revised and somewhat narrowed statute, however, was ap-

240. See notes 219-22 & accompanying text *supra*.

241. Note, *Fighting Conflicts of Interest in Officialdom: Constitutional and Practical Guidelines for State Financial Disclosure Laws*, 73 MICH. L. REV. 758, at 758 n.5 (1975).

242. See *Illinois State Empl. Ass'n v. Walker*, 57 Ill. 2d 512, 315 N.E.2d (1974), *cert. denied sub nom. Troopers Lodge No. 41 v. Walker*, 419 U.S. 1058 (1974); *Evans v. Carey*, 53 App. Div. 2d 109, 385 N.Y.S.2d 965, *aff'd mem.*, 40 N.Y.2d 1008, 391 N.Y.S.2d 393, 359 N.E.2d 983 (1976).

243. See, e.g., CONN. GEN. STAT. ANN. § 1-76 (Supp. 1977); HAW. REV. STAT. § 84-17 (Supp. 1977); cf. UTAH CODE ANN. § 67-16-7 (Supp. 1977) (public official required to disclose only any substantial interest in any business entity that is subject to the regulation of the political subdivision of which he is an officer).

244. See, e.g., CAL. GOV'T CODE § 3625 (West Supp. 1977), which requires disclosure of real property in which the official has "a direct or indirect interest worth more than one thousand dollars," and which defines indirect interest as:

investment or interest owned by the spouse or dependent children of the public official, by an agent on his behalf, by any business entity controlled by the public official or by a trust in which he has a substantial economic interest. A business entity is controlled by a public official if the public official, agents, spouse or dependent children, possess more than 50 percent of the ownership interest in the entity. A public official has a substantial economic interest in a trust, when the official, his spouse or dependent children have a present or future interest worth more than one thousand dollars (\$1,000).

245. 2 Cal. 3d 249, 466 P.2d 225, 85 Cal. Rptr. 1 (1970); see Note, *Fighting Conflicts of Interest*, *supra* note 241.

246. See cases discussed at text accompanying notes 147-72 *supra*.

proved by the same court in 1974,²⁴⁷ and recent decisions in Washington,²⁴⁸ Illinois,²⁴⁹ and New York²⁵⁰ have sustained disclosure requirements in the face of similar attacks. The courts have noted the considerably broader power of government to intrude on the personal liberties of its employees than of the public generally, as evidenced by the U.S. Supreme Court's reaffirmance of the Hatch Act in 1973.²⁵¹ Particularly where disclosure requirements are limited to upper-echelon employees and elected officials having substantial decisionmaking power,²⁵² they are unlikely to encounter major constitutional difficulties in the future. While they run counter to the desire of some landowners for secrecy, it is improbable that those interested in holding public office will be greatly deterred by the mandate to disclose.

C. *Disclosing Quality or Condition*

In recent years, a number of state courts have extended the law of implied warranties to new housing construction.²⁵³ Tort rules relating to fraud and concealment also may give rise to duties of disclosure by sellers of realty.²⁵⁴ In a sense, both of these bodies of law may be viewed as mandating disclosure, although failure to comply will impose a sanction on the seller only if an actual defect in the property gives rise to damages. Moreover, these tort and warranty rules fail to cover many situations in which the condition of the property results in a serious financial loss to a buyer.²⁵⁵ A recognition of these weaknesses, and of the resulting hardships on purchasers of real estate, led to the enactment of the Federal Interstate Land Sales Full Disclosure Act in 1968,²⁵⁶ and to many similar state statutes that require specific and detailed written

247. *County of Nevada v. MacMillen*, 11 Cal. 3d 662, 522 P.2d 1345, 114 Cal. Rptr. 345 (1974).

248. *Fritz v. Gorton*, 83 Wash. 2d 275, 517 P.2d 911 (1974).

249. *Illinois State Empl. Ass'n v. Walker*, 57 Ill. 2d 512, 315 N.E.2d 9, cert. denied sub nom. *Troopers Lodge No. 41 v. Walker*, 419 U.S. 1058 (1974).

250. *Evans v. Carey*, 53 App. Div. 2d 109, 385 N.Y.S.2d 965, aff'd mem., 40 N.Y.2d 1008, 391 N.Y.S.2d 393, 359 N.E.2d 983 (1976).

251. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973).

252. Limitations of this type influenced the court to validate the statute in *County of Nevada v. MacMillen*, 11 Cal. 3d 662, 522 P.2d 1345, 114 Cal. Rptr. 345 (1974).

253. See note 15 *supra*.

254. See 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 7.14 (1956); W. PROSSER, *supra* note 16, § 106 (4th ed. 1971).

255. See notes 15 & 17 *supra*.

256. *Housing and Urban Development Act of 1968*, Pub. L. No. 90-448, Title XIV, 82 Stat. 476 (codified at 15 U.S.C. §§ 1701-1720 (1976)).

disclosures as a part of the land sales process.²⁵⁷ Yet these laws, too, are limited in scope. For example, they generally do not apply to improved land or small subdivisions.²⁵⁸ There are still no generally applicable requirements in the United States that owners of land or buildings disclose their quality or condition, either to prospective purchasers or to the public at large.

Disclosures about structural quality or condition differ from disclosures of ownership in an important respect. They require some kind of inspection of the property to adduce the desired information. The record owner of real estate will generally have at his fingertips the names and addresses of those who have beneficial interests in the property. Presumably, he can report them accurately and with little difficulty if given a legal incentive to do so. But with respect to quality or condition, the owner's statement may not be so reliable. Standards for such matters vary and are somewhat subjective. The owner's self-interest will usually lead him to overstate the property's good condition. To solve these problems, inspection by an independent third party may be a highly desirable element if a program of disclosure is to yield reliable information.²⁵⁹ Third-party inspections raise additional problems, however. First, should such inspection be mandatory or permissive? Should governments require a certificate of inspection prior to sale or would a policy of encouraging the availability of such services be sufficient? If mandatory, what sanctions should be available to ensure compliance? Second, who should provide inspection services: the government, federal or state, or private inspection companies, perhaps licensed by the appropriate governmental entity? Finally, there are issues of privacy and cost. If inspection by government officers is to be mandatory, significant constitutional considerations may arise. With respect to cost, competing public policy considerations must be weighed in deciding whether to treat the cost of inspection services as one to be borne by buyer or seller as part of a private business transaction or to be borne by the general taxpayer as a necessary regulation of important governmental interests.

257. See Note, *Regulation of Interstate Land Sales*, 25 STAN. L. REV. 605 (1973).

258. The federal Act, for example, is not applicable to developments containing fewer than 50 lots or to land on which a residential, commercial or industrial building exists or is to be built within two years. 15 U.S.C. § 1702(a)(1), (3) (1976).

259. In administering the Interstate Land Sales Full Disclosure Act, the Department of Housing and Urban Development (HUD) does not employ independent inspection. It relies instead on the developer's information, with investigations by government officials when discrepancies develop. See 24 C.F.R. §§ 1720.45-100 (1977). HUD has issued numerous citations to developers for violations of the Act.

Any proposed program of inspections involves broad public policy considerations extending beyond the scope of this article. A discussion of the privacy issue, however, is appropriate here. The Supreme Court dealt with governmental inspections in *Camara v. Municipal Court*,²⁶⁰ in which a residential tenant challenged a city housing code inspector's right to make an inspection of his building. The Court concluded that the fourth amendment prohibited warrantless searches in the absence of the occupant's consent, but it promulgated a relaxed standard of probable cause for the issuance of a warrant to perform a code inspection. Although reasonable legislative and administrative standards must be satisfied with respect to the building to be inspected, the Court held that such standards "may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling."²⁶¹ Apparently, *some*, but not much, evidence of probable violation of existing codes is necessary to obtain a warrant. Of course, in many cases—probably the vast majority—the occupant will consent to the inspection and no warrant will be needed.²⁶²

A few jurisdictions have attempted to circumvent the warrant requirement by indirection. *Currier v. Pasadena*²⁶³ involved a city ordinance requiring that a certificate of occupancy, based on a current code inspection, be issued each time residential property was transferred. The city argued that this system did not compel inspection, but sought only to regulate the relationship between the contracting parties. The court, however, was unimpressed, noting that the price of privacy exacted by the ordinance was the loss of a prospective sale and concomitant income. Although holding this technique to be void on its face with respect to nonconsenting owners, the court allowed the ordinance to stand upon the city's stipulation that warrant requirements were to be read into it.

Cincinnati recently adopted an ordinance with broader coverage. Like Pasadena, it required a certificate of inspection for each residential real estate transfer. It, however, provided criminal penalties for violations and included no search warrant procedure for nonconsenting owners. The ordinance also required the seller to warrant to the purchaser that the prop-

260. 337 U.S. 523 (1967).

261. *Id.* at 538; *accord*, *Marshall v. Barlow's, Inc.*, 98 S.Ct. 1816, 1824 (1978).

262. See Warren, *Report of Committee on Building Codes and Fire Prevention Ordinances*, 33 NIMLO MUNICIPAL L. REV. 349, 359 (1970).

263. 48 Cal. App. 3d 810, 121 Cal. Rptr. 913, *cert. denied*, 423 U.S. 1000 (1975); *see also* *Telins v. Municipal Court*, 5 Cal. App. 3d 455, 85 Cal. Rptr. 459 (1970).

erty complied with the building and zoning codes unless the purchaser was given a copy of the certificate of inspection or had actual knowledge of the deficiencies in question at the time of contracting. In *Wilson v. City of Cincinnati*,²⁶⁴ the Ohio Supreme Court, relying on *Camara*, held the criminal penalties in the ordinance to be void in the absence of a search warrant clause. The warranty provision was left essentially untouched, however, and must be considered a far-reaching step. In essence, it compels the seller either to provide essential information to the purchaser or to warrant that there is none to provide. Since the warranty is supported by city code standards of quality and is applicable to both old and new housing, it is considerably more inclusive than the implied warranties imposed on builders of new housing in recent years by the courts.²⁶⁵

As an alternative solution to the fourth amendment search warrant problem, a statute or ordinance might shift the burden of obtaining the inspection to the owner himself. A city or state government could license private firms to perform such inspections,²⁶⁶ and the owner could make his own selection and arrangements. Under such a system the intrusion caused by inspection would be minimal and claims of unconstitutionality would be greatly attenuated.

The related issue of who should bear the costs of inspection involves both public policy and empirical considerations. A threshold question is whether the social cost of any inspection system can be justified by its benefits. Clearly the market will function better when information from inspections is made available, but how much better? How much and what type of information should be disclosed? If prospective purchasers decide to obtain their own information, as in the geophysical exploration cases, and can do so in a nonobtrusive fashion, there is no reason for the law to bar their way. They can decide for themselves whether the game is worth the candle. The empirical question of how much disclosure is enough will itself be answered by the marketplace through prospective purchasers' willingness to seek additional information at their own expense. This does not follow, however, if the burden of paying for the information is imposed on the public through governmental inspection. Here, the balancing of incentives through the market is replaced by a balancing of public policy considerations by legislators, administrators, and judges. This

264. 46 Ohio St. 2d 138, 346 N.E.2d 666 (1976).

265. See note 15 *supra*.

266. Numerous private firms have begun operation in metropolitan areas in recent years, offering inspections and warranty services to both new and existing housing. See *Home Warranties: Acceptance Slow*, Wash. Post, Feb. 22, 1977, § D, at 1, col. 5.

issue is raised by the Interstate Land Sales Full Disclosure Act²⁶⁷ as well as by the municipal inspection statutes just discussed. There is no a priori way to know whether the benefits of a facilitated market are great enough to justify the inspection program's costs. Hopefully, the experience of federal housing programs as well as state and local inspection laws will provide a framework for a fuller analysis of these issues in the future.

CONCLUSION

An inherent conflict exists between the desire of owners for secrecy concerning their land and the interests of prospective buyers, government, and the general public in the availability of information. Although a fully satisfactory resolution of this conflict ultimately may not be possible, the general tendency of the law is, and should be, in favor of the free flow of information.

In cases involving the obtaining and disclosure of true information by a third party, no right of action should accrue to the landowner unless the third party's statements are highly intimate or embarrassing—an improbable situation when information about land usage, quality, or condition is involved, and virtually inconceivable when the information concerns land ownership. This result should follow whether government or a private third party has made the disclosures. Indeed, it is strongly arguable that the first amendment requires this degree of freedom from liability for informants.²⁶⁸ A third party who gains land-related information, however, should be subject to a legal duty to share it with the owner.

Cases dealing with the tort right of privacy, injurious falsehood, and interference with contract or prospective advantage sharply limit the liability of informants and are generally consistent with the foregoing suggestions. The law of geophysical exploration, by contrast, has imposed liability; these cases may well state an unconstitutional position, and in any event should be overruled as a matter of policy. Moreover, to the extent that relevant information concerning land exists in the hands of federal or state governmental agencies, it should be, and generally has been, made available by them for the asking under the Freedom of Information Act and similar state statutes unless disclosure would result in serious invasion of personal privacy or would deprive landowners of trade secrets.

267. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, Title XIV, 82 Stat. 476 (codified at 15 U.S.C. §§ 1701-1720 (1976)).

268. See notes 74-84 & accompanying text *supra*.

Whether the law should compel landowners themselves to disclose information about the title or condition of their property is less easy to decide. With regard to title, it is doubtful that a blanket rule requiring divulgence of beneficial ownership in all cases is necessary or appropriate. It would be better to itemize by statute the situations involving the public interest. For example, full public disclosure should be required in all sales or leases to public bodies, and all significant financial and real estate interests held by high-level public officials should be made public. In addition, every person who possesses or is acquiring an interest in a parcel of land should be able to compel, by court order if necessary, a full disclosure of the identity of all natural persons who hold beneficial interests in that same land, no matter how those interests may be disguised.²⁶⁹ Thus, tenants should have access to the identity of their landlords, remaindermen of their life tenants, and purchasers of their vendors.²⁷⁰ In these and similar situations, the inherent intimacy of the legal relationships and the possibility of legal claims arising between the parties fully justify a rule of law that proscribes secrecy.

The same rule should be applied in favor of persons selling land, but only when a credit sale is involved. Buyers who purchase with cash, however, should not be required to make such disclosures, since the seller has much less need for the knowledge if he has been fully paid. Moreover, a contrary rule would make land assembly for large projects exorbitantly costly to developers.

Finally, the law should recognize a general right on the part of any petitioner to obtain a court order compelling disclosure of beneficial ownership of land upon a showing of legitimate need that outweighs the owner's interest in secrecy, even in situations beyond those outlined above. This standard is admittedly imprecise, but it is impossible to anticipate all situations in which disclosure may be desirable. Some judicial discretion is therefore appropriate.

Compelling owners to disclose information about the condition or quality of their property is a much more uncertain business, since it introduces factors of cost and intrusion, which inevitably follow if inspection is required. It seems reasonably clear that vendors of realty should be liable for the correction of substantial defects of which they had knowledge at the time of the sale. As noted above, however, it is not easy to

269. Some limits are obviously necessary when the artificial entity has a large number of beneficial owners. For example, there is little point in making General Motors disclose the names of its shareholders when it sells parcels of land. Some arbitrary rule seems necessary. Perhaps entities with more than 20 unrelated members, beneficiaries, or shareholders should be exempt from disclosure.

270. See note 219 *supra*.

ascertain whether more far-reaching programs involving systematic inspections or disclosures are appropriate from an economic or public policy standpoint. Experience with existing inspection programs should be helpful.

Generally, though, if the states are laboratories of democracy, one must conclude that their experiments in breaking down the barriers of secrecy in real estate have been haphazard and poorly conceived. In part, this may be due to the absence of any great political interest in the matter in most jurisdictions. Yet it is clear that secrecy is often an unjustifiable impediment to rational governmental policymaking, law enforcement, public debate, and fair and efficient private markets. More thoughtful and comprehensive action by the courts and legislatures is needed.